Supreme Court, U.S.
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No.

In the Supreme Court of the United States

NATIONAL PARK HOSPITALITY ASSOCIATION,

Petitioner,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, *ET AL.*

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613, applies to contracts between the National Park Service and private parties for the development, operation, and maintenance of concessions, such as restaurants, lodges, and gift shops, in the national parks.

RULE 14.1(b) STATEMENT

In addition to the National Park Hospitality Association, plaintiffs/appellants in the court of appeals (in four consolidated cases) were Amfac Resorts L.L.C. (since renamed Xanterra Parks and Resorts L.L.C.), ARAMARK Sports and Entertainment Services, Inc., and Hamilton Stores, Inc. In addition to the United States Department of the Interior, respondents are Gale Norton, Secretary of the Interior, Fran P. Mainella, Director of the National Park Service, and Delaware North Park Services, Inc. (which intervened as a defendant in this and one of the consolidated cases).

RULE 29.6 STATEMENT

The National Park Hospitality Association ("NPHA") is a non-profit trade association that has no parent corporations or stock. The NPHA represents concessioners who operate concessions, such as restaurants, lodges, recreational services, and gift shops, in the national parks.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, the National Park Hospitality Association ("NPHA"), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-34a) is reported at 282 F.3d 818. The Memorandum Opinion of the district court addressing the issue before this Court (App., *infra*, 35a-92a) is reported at 142 F. Supp. 2d 54. Other opinions issued by the district court are reported at 143 F. Supp. 2d 7 and 150 F. Supp. 2d 96.

JURISDICTION

The judgment of the court of appeals was entered on March 1, 2002, and a timely petition for rehearing was denied on May 8, 2002 (App., *infra*, 93a-94a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 3(a) of the Contract Disputes Act of 1978, 41 U.S.C. § 602(a), provides:

> (a) Unless otherwise specifically provided herein, this chapter applies to any express or implied contract (including those of the nonappropriated fund activities described in sections 1346 and 1491 of Title 28) entered into by an executive agency for –
>
> (1) the procurement of property, other than real property in being;
>
> (2) the procurement of services;
>
> (3) the procurement of construction, alteration, repair or maintenance of real property; or,

(4) the disposal of personal property.

36 C.F.R. § 51.3 provides in relevant part:

> *A concession contract (or contract)* means a binding written agreement between the Director [of the National Park Service] and a concessioner entered under the authority of this part or the [National Park Concessions Policies Act of 1965, Pub. L. No. 89-249] that authorizes the concessioner to provide certain visitor services within a park area under specified terms and conditions. *Concession contracts are not contracts within the meaning of 41 U.S.C. 601 et seq. (the Contact Disputes Act)* and are not service or procurement contracts within the meaning of statutes, regulations or policies that apply only to federal service contracts or other types of federal procurement actions.

(second emphasis added).

STATEMENT

This case concerns the applicability of the Contract Disputes Act of 1978 ("CDA") to concessions contracts, and in particular to contracts between the National Park Service ("NPS") and the private concessioners who contract to provide visitor services and to operate and maintain facilities in the national parks. The language of the CDA broadly covers all contracts entered into by a federal agency for the procurement of personal property, services, or the repair and maintenance of real property. Despite the CDA's breadth, the NPS has asserted by regulation that the statute does not apply to its concessions contracts. In upholding that regulation, the District of Columbia Circuit disagreed with the Federal Circuit's interpretation of the CDA and ignored the views of the Department of the Interior's own Board of Contract Appeals. Furthermore, the Comptroller General has specifically questioned the D.C. Circuit's reasoning.

As Congress recognized when it passed the CDA, "[h]ow [government] procurement functions has a far-reaching impact on the economy of our society and on the success of many major Government programs." S. REP. NO. 95-1118, at 4, 1978 U.S.C.C.A.N. 5235, 5238. Given the importance of the CDA to government contracting – and the court of appeals' cramped interpretation of the scope of this important federal statute – review by this Court is plainly warranted.

1. The Contract Disputes Act of 1978, Pub. L. No. 95-563, 92 Stat. 2383, 41 U.S.C. §§ 601-613, on its face applies to *all* government contracts for "the procurement of services" or "the procurement of construction, alteration, repair or maintenance of real property." 41 U.S.C. § 602(a)(2)-(3). The statute was designed to replace a system of dispute resolution procedures based on "[t]he predilections of different agencies" (S. REP. NO. 95-1118, at 3) that was "often too expensive and time consuming for the efficient and cost-effective resolution of small claims and, on the other hand, often fail[ed] to provide the procedural safeguards and other elements of due process that should be the rights of litigants" (*id.* at 4). Thus, the CDA has "broad application in order to unify the diverse and often inconsistent procedures presently existing among the many procuring agencies." *Id.* at 17.

The CDA "provides a fair, balanced, and comprehensive statutory system of legal and administrative remedies in resolving Government contract claims." *Id.* at 1; see also H.R. REP. NO. 95-1556, at 5. Under the CDA, parties contracting with the government have a number of important procedural and substantive rights. The CDA establishes that all claims "relating to" a contract covered by the CDA are subject to the Act's administrative dispute processes. See 41 U.S.C. § 605(a). Those processes provide contractors with neutral arbiters to review decisions reached by the agency's contracting officer. In particular, the contractor has the choice either to appeal any decision to the agency's "Board of Contract Appeals" (see 41 U.S.C. §§ 606, 607)) or to remove the mat-

ter to the Court of Federal Claims (see 41 U.S.C. § 609(a)(1)), which is statutorily required to review the agency's decision "de novo" (41 U.S.C. § 609(a)(3)). Substantively, a major advantage of the CDA over the hodgepodge of dispute-resolution schemes it replaced is that contractors are entitled to interest on any amount found due to them on their claims. See 41 U.S.C. § 611; *Oroville-Tonasket Irrigation Dist.* v. *United States*, 33 Fed. Cl. 14, 23 n.3 (1995).

2. The NPS was created in 1916 "to oversee our national parks and to 'conserve the scenery and the natural and historic objects and the wild life therein and * * * provide for the enjoyment of the same.'" App., *infra*, 49a (quoting 16 U.S.C. § 1 (omission in original)). In the Act creating the NPS, "Congress authorized the Interior Secretary to 'grant privileges, leases, and permits for the use of land for the accommodation of visitors' to each of the 'various parks, monuments, or other reservations' under the Secretary's authority." App., *infra*, 2a (quoting An Act to Establish a National Park Service, ch. 408, 39 Stat. 595 (1916)).

"[P]rovid[ing] for the enjoyment" of the national parks (16 U.S.C. § 1) generally requires that visitors both be offered various services throughout the parks and be provided access to facilities, such as lodges, restaurants, and retail outlets, where those services are delivered. Because the government has been unable or unwilling to undertake on its own behalf the huge financial burdens and other responsibilities associated with the provision of these visitor services and facilities, throughout its history the NPS has relied on private concessions contractors to build, maintain, and operate its visitor-service facilities and to provide many of the other services that the public typically associates with a national park, such as outfitter and guide services. See App., *infra*, 49a (NPS has always "relied on private concessioners for the provision of 'lodging, food, merchandising, transportation, outfitting and guiding, and similar activities.'") (quoting 64

Fed. Reg. 20,630 (Apr. 17, 2000)). The national parks concessions program, therefore, historically has been a partnership between the NPS and concessions contractors to develop and provide access to the national parks for the enjoyment of the public.

Between 1916 and 1965, there was no specific statutory scheme governing the relationship between the NPS and the concessioners that contracted to provide visitor services in the national parks. In light of growing industry and governmental concern about the NPS's concessions-contracting policies (see App., *infra*, 3a-4a), Congress enacted the National Park Service Concessions Policy Act ("1965 Act"), Pub. L. No. 89-249, 79 Stat. 969 (1965), to govern concessions contracts. The 1965 Act basically codified preexisting NPS concession policy. See S. REP. NO. 89-765, 1965 U.S.C.C.A.N. 3489, 3489 (principal purpose of the 1965 Act was "to put into statutory form policies which * * * have heretofore been followed by the [NPS] in administering concessions"). Among other things, the 1965 Act afforded concessioners a preferential right of renewal for their concessions contracts (16 U.S.C. § 20d) and authorized the NPS to grant other specified contractual inducements for making investments in the national parks. See App., *infra*, 4a, 50a-51a. In exchange, "[c]oncessioners paid the government a franchise fee * * * for the privilege of operating on federal land." *Id.* at 4a.

In 1998, Congress repealed the 1965 Act and passed a replacement statute, the National Parks Omnibus Management Act of 1998 ("1998 Act"), Pub. L. No. 105-391, 112 Stat. 3497 (codified with certain exceptions at 16 U.S.C. §§ 5951-5966). The 1998 Act altered various technical aspects of the system under which the NPS enters into private concessions contracts to provide visitor services in the national parks. The 1998 Act sought to further the mission of the national park system by protecting the parks for the future while ensuring that the agency continued to provide the appropriate "ac-

commodations, facilities, and services" that are "necessary and appropriate for public use and enjoyment." See 16 U.S.C. § 5951(b)(1). In particular, the 1998 Act specified that the NPS "shall utilize concessions contracts to authorize a person, corporation, or other entity to provide accommodations, facilities, and services to visitors to units of the National Park System." 16 U.S.C. § 5952.

The NPS has since issued regulations implementing the 1998 Act (see Concession Contracts, 65 Fed. Reg. 20,630 (Apr. 17, 2000) (codified at 36 C.F.R. pt. 51)), as well as a model "Standard Concession Contract" (65 Fed. Reg. 26,052 (May 4, 2000)). The regulations declare that:

> Concession contracts are not contracts within the meaning of 41 U.S.C. 601 *et seq*. (the Contact Disputes Act) * * *.

36 C.F.R. § 51.3.

3. In November and December 2000, the National Park Hospitality Association ("NPHA"), a non-profit trade association that represents many concessioners who do business in the national parks, and three individual concessioners filed separate actions challenging aspects of the NPS regulations and Standard Concession Contract. Among other claims, the NPHA and the individual plaintiffs (collectively, "NPHA") challenged 36 C.F.R. § 51.3 as being contrary to the CDA. The NPHA alleged that the regulation improperly excluded NPS concessions contracts from the CDA, despite (1) the CDA's plain language, legislative purpose, and legislative history; (2) contrary decisions of the Federal Circuit and its predecessor (the Court of Claims); (3) contrary decisions of the Court of Federal Claims and the Department of Interior's Board of Contract Appeals ("IBCA"); (4) the position taken by the NPS in at least one prior reported decision on a concessions-contract dispute; and (5) the obvious consequent ability, if the regulation were upheld, of virtually any agency to circumvent the CDA.

The cases were consolidated in the district court. On May 23, 2001, the court granted summary judgment in the NPS's favor in most respects, and in particular held that the CDA does not apply to concessions contracts. See App., *infra*, 68a-72a. The district court acknowledged that in an NPS concessions contract "the government is receiving services" and "is contracting for the provision of amenities to the visitors of its national parks" (*id.* at 68a), thus fulfilling its statutory obligation to accommodate visitors (see generally 16 U.S.C. §§ 1, 5951). The court also acknowledged that "because the concession contracts contain various terms relating to the stewardship of concession areas, * * * it can be said that the government is also bargaining for the maintenance of real property." App., *infra*, 68a. Despite these conclusions, the court determined that the CDA is ambiguous as to whether it applies to concessions contracts. See *id.* at 68a-69a. The court then afforded *Chevron* deference to the NPS and concluded that 36 C.F.R. § 51.3 was a permissible interpretation of the CDA. See App., *infra*, 70a.

The court of appeals affirmed. At the outset, the court of appeals held that the district court's rationale was erroneous: the NPS "does not administer the Contract Disputes Act, and thus may not have interpretative authority over its provisions." App., *infra*, 27a.[1] Accordingly, the court of appeals agreed with the NPHA that the agency was not entitled to *Chevron* deference in its interpretation of the CDA. Nevertheless, the court upheld the determination that the CDA does not apply to concessions contracts:

> The primary purpose of concessions contracts is to permit visitors to enjoy national parks in a manner consistent with preservation of the parks. 16 U.S.C.

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[1] Congress explicitly granted authority to implement and interpret the CDA to the Administrator of the Office of Federal Procurement Policy, not to the Secretary of the Interior. See 41 U.S.C. § 607(h).

> § 5951. That the government receives monetary compensation or incidental benefits from the concessioners' performance is not enough to sweep these contracts into the ambit of the Contract Disputes Act.

Id. at 29a. In the D.C. Circuit's view, concessions contracts do not fall within the CDA because their purpose is to benefit "park area visitors," rather than the government. *Id.* at 27a.

REASONS FOR GRANTING THE PETITION

The Contract Disputes Act was enacted both to standardize the federal government's contracting policies and to ensure that those who contract with the government receive fair treatment. The decision below that the CDA is inapplicable to government contracts that procure goods or services for the benefit of third parties, rather than for the government itself, cannot be squared with the plain language of the CDA and creates a gaping hole in the coverage of this important federal statute. In addition, the decision is in direct conflict with the decisions of the Federal Circuit and its predecessor, the Court of Claims, and has been rejected or questioned by the Department of Interior's own Board of Contract Appeals and by the Comptroller General. Further review is plainly warranted.

A. The Decision Below Is Clearly Incorrect And Is Contrary To The Views Of The Comptroller General And The Department Of Interior's Own Board Of Contract Appeals.

The D.C. Circuit's construction of the Contract Disputes Act is demonstrably incorrect. The CDA on its face applies to *any* "express or implied contract" entered into by "an executive agency" for "the procurement of" either "services" or the "construction, alteration, repair or maintenance of real property" (41 U.S.C. § 602(a)(2)-(3)), unless the CDA "specifically provide[s]" otherwise. *Id.* § 602(a). The NPS does

not deny that concessions contracts are "contracts" and that it is an "executive agency," nor does it claim that the CDA itself specifically exempts these contracts. Thus, the NPS is left to assert that concessions contracts entail neither the procurement of services nor the procurement of construction, repair, or maintenance of real property. However, concessions contracts are manifestly of both these sorts.

1. The NPS plainly "procur[es] services" when it contracts with a concessioner. The NPS has a statutory duty to provide "accommodations, facilities, and services that * * * are necessary and appropriate for public use and enjoyment" of the national parks. 16 U.S.C. § 5951(b)(1); see also 16 U.S.C. § 1. Rather than undertaking these tasks itself, the NPS discharges its statutory duty by procuring the services of contractors who, subject to pervasive regulation and supervision by the agency, provide visitor services, staff park facilities, construct, maintain, and repair federally-owned structures, and perform related functions that promote the public's use and enjoyment of the national parks. For example, under section 3(a)(1) of the Standard Concession Contract, 65 Fed. Reg. at 26,064, the NPS lists for each contract the "visitor services" that the concessioner "is required to provide * * * during the term of" the contract. Similarly, section 10(a) of the Standard Concession Contract provides that concessioners "shall be solely responsible for maintenance, repairs, housekeeping, and groundskeeping for all Concession Facilities to the satisfaction of the Director." *Id.* at 26,068-26,069. Plainly, the NPS is procuring these services from concessioners.

That visitors to the national parks enjoy a benefit from concessioners' actions in no way negates the obvious fact that the government has "procur[ed] services" – among others, the discharge of its statutory duty to accommodate the public (see 16 U.S.C. §§ 1, 5952) and the upkeep of its facilities within the parks. Thus, as the district court itself acknowledged, "the government is receiving services; it is

contracting for the provision of amenities to the visitors of its national parks" (App., *infra*, 68a).

2. The NPS is also typically "procur[ing] construction, alteration, repair, or maintenance of real property" by contracting with concessioners. By statute, all the real property that concessioners construct or use in the national parks belongs to the government, not to the concessioner. See App, *infra*, 20a; 16 U.S.C. § 5954(d). Concessioners are nonetheless responsible for constructing, maintaining and repairing that property. For example, under section 9(a) of the Standard Concession Contract, 65 Fed. Reg. at 26,068, concessioners "construct or install upon lands assigned to the Concessioner * * * those real property improvements that are determined by the [NPS] to be necessary and appropriate for the conduct by the Concessioner of the visitor services required and/or authorized under [the contract]." Such real property "will immediately become the property of the United States." *Ibid.* Similarly, section 9(d) of the Standard Concession Contract requires concessioners to "undertake and complete" a "Concession Facilities Improvement Program," the specifics to be detailed in each contract. *Ibid.* Section 6(g) makes concessioners responsible for weed and pest management at concession facilities. *Id.* at 26,067. Finally, as discussed above, section 10(a) provides that concessioners "shall be solely responsible for maintenance, repairs, housekeeping, and groundskeeping for all Concession Facilities to the satisfaction of the Director." *Id.* at 26,068-26,069. It is thus beyond question that the government is procuring construction, repair, and maintenance services – as the district court again recognized (App., *infra*, 69a).

3. The D.C. Circuit nonetheless held that concessions contracts are not subject to the CDA because "[t]heir function is * * * to procure services or goods for" "park area visitors" rather than "for the government." App., *infra*, 27a. This statement is both incorrect and irrelevant.

The court of appeals' statement is incorrect because, as noted above, concessions contracts provide a "service" *to the government* by helping the NPS discharge its statutory obligation to accommodate visitors in their enjoyment of the national parks. In addition, whoever might be said to "benefit" from the provision of goods and services in the national parks, it is beyond question that *the government itself* is the principal beneficiary of the concessioners' contractual obligation to maintain and repair park facilities *owned by the government*. A contract to maintain and repair the El Tovar Hotel at Grand Canyon National Park is no different in this respect than a contract to maintain and repair the John F. Kennedy Center for the Performing Arts (see *Grunley Constr. Co.*, ENGBCA No. 6327, 99-1 BCA ¶ 30,138, 1998 WL 835156 (Nov. 20, 1998)) or the Smithsonian Museums (see *Niko Contracting Co.* v. *United States*, 39 Fed. Cl. 795 (1997), aff'd, 173 F.3d 437 (Fed. Cir. 1998) (table); *Libra Eng'g Inc.*, NASABCA Nos. 1182-17 *et al.*, 1984 WL 13526 (July 13, 1984)).

Moreover, the court of appeals' statement is irrelevant because nothing in the CDA suggests that that statute applies only to agency contracts that procure goods, services or maintenance of real estate "for the government." App., *infra*, 27a. To the contrary, the CDA unambiguously covers *all* procurement contracts entered into by government agencies, even those that may be said to benefit third parties. As the Court of Claims has observed, "[i]t is hoped that *every* Government purchase 'benefits the public' in some way." *Yosemite Park & Curry Co.* v. *United States*, 582 F.2d 552, 559 n.8 (Ct. Cl. 1978) (emphasis in original). Indeed, given the purposes of the CDA – to standardize government contracting and to bring fairness to the government contracting process – it is hard to see why it would matter whether the goods, services, or property repair contracted for by the government principally benefit "park area visitors" rather than the government itself. The court of appeals was not at liberty to add

limiting language to a statute that Congress intended to be broad and comprehensive. See *J.E.M. AG Supply, Inc.* v. *Pioneer Hi-Bred Int'l., Inc.*, 122 S. Ct. 593, 598 (2001); *United States* v. *Rodgers*, 466 U.S. 475, 480 (1984); *Canadian Aviator, Ltd.* v. *United States*, 324 U.S. 215, 222 (1945).[2]

4. As the court of appeals acknowledged (App., *infra*, 28a-29a), the Department of the Interior's own Board of Contract Appeals has long held that NPS concessions contracts are subject to the CDA and has specifically found that the portion of 36 C.F.R. § 51.3 exempting such contracts from the CDA is invalid. See *Watch Hill Concessions Inc.*, IBCA No. 4284-2000, 01-1 BCA ¶ 31,298, 2001 WL 170911, at *6 (Feb. 16, 2001); *Nat'l Park Concessions, Inc.*, IBCA No. 2995, 94-3 BCA ¶ 27,104, 1994 WL 462401 (Aug. 18, 1994); *R & R Enters.*, IBCA No. 2417, 89-2 BCA ¶ 21,708, 1989 WL 27790, at *32 (Mar. 24, 1989), aff'd on reconsideration, 89-3 BCA ¶ 22,043, 1989 WL 75890 (July 6, 1989). As the Board stated in *Watch Hill*,

> Congress could not have expressed itself more clearly to the effect that *all* contract claims based on a valid contractual theory fall within the procuring agencies' jurisdiction under the Contract Disputes Act. This was essential to Congress' design that all contract disputes be resolved according to the same set of procedures, beginning with the decision of the contracting officer.

2001 WL 170911, at *6 (emphasis added).

Rather than follow these decisions by the expert IBCA (see 41 U.S.C. §§ 607(d), 609(a)(1)), the court of appeals relied on *YRT Services Corp.* v. *United States*, 28 Fed. Cl. 366 (1993). See App., *infra*, 28a. But *YRT* held only that another set of rules, the Federal Acquisition Regulations ("FAR"), do not apply to concessions contracts. In addressing the question of whether the FAR applied to concessions contracts, *YRT* analogized to the applicability of yet another federal contracting statute – the Competition in Contracting Act ("CICA"), Pub. L. 98-369, 98 Stat. 1175 (codified at 31 U.S.C. §§ 3551-3556, 41 U.S.C. § 253) – which the *YRT* court opined did not apply to concessions contracts. *See YRT*, 28 Fed. Cl. at 392. In making this CICA-applicability analogy, however, the *YRT* decision offered no opinion about the applicability of the CDA.

Even if *YRT* were relevant to this case, that decision was expressly based on the views of the Comptroller General, who administers the CICA. See 28 Fed. Cl. at 392 (citing *Stephen Sloan Marine Corp.*, B-234219, 89-1 C.P.D. ¶ 435 (May 9, 1989)). But the Comptroller General since has clarified that *YRT* was based on a misunderstanding of his CICA jurisdiction. Thus, in adopting *YRT's* "permits" analogy, the D.C. Circuit ignored the Comptroller General's repeatedly-expressed position that concessions contracts are *not* like "permits," but instead involve services for the agency and hence are subject to CICA.[3]

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[2] Nor was the court of appeals correct that coverage under the CDA requires the government to "commit[] to pay out government funds." App., *infra*, 28a (internal citation and quotation marks omitted). CDA coverage explicitly does not depend on the expenditure of appropriated funds. See 41 U.S.C. § 602(a). Thus, the CDA is different from most other procurement-related statutes, which *are* limited to appropriated-fund activities and therefore do not apply to NPS concessions contracts. (For example, the Davis-Bacon Act (40 U.S.C. § 276a *et seq.*) applies only to certain "contract[s] in excess of $2,000" (*id.* § 276a(a)), and the Service Contract Act (41 U.S.C. § 351 *et seq.*) applies to contracts "in excess of $2,500" (*id.* § 351(a)); neither statute applies to NPS concessions contracts.)

[3] See *Total Procurement Services, Inc.*, B-255934.3, 1994 WL 450445 (Aug. 16, 1994) ("Where a license agreement or conces-

Underscoring the D.C. Circuit's error, the Comptroller General just last month explained the distinction between NPS "permits" and NPS "contracts," holding that NPS concessions contracts are "procurements" within its CICA jurisdiction:

> [W]here the award of a concession contract included the provision of numerous services to the government, which the agency might otherwise have had to purchase or perform itself, we found that the solicitation involved a procurement of services. * * * On the other hand, * * * where the agency's issuance of concession permits merely allowed entry by visitors into a national park, and did not also include the provision of services to the government, we did not exercise jurisdiction.

Starfleet Marine Transp., Inc., B-290181, 2002 U.S. Comp. Gen. LEXIS 90, at *14-15 (July 5, 2002).

Indeed, the decision in *Starfleet Marine* considered and rejected the D.C. Circuit's reasoning in this very case:

> In reaching its conclusion and holding, the [D.C. Circuit] seems to have assumed that all concession contracts result in no more than "incidental benefits" to the government. In its brief discussion of this

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sion contract confers a benefit upon the government and furthers the function of an agency, we view the agreement or contract as one involving the procurement of property or services and therefore subject to our bid protest jurisdiction."); *West Coast Copy, Inc.*; B-254044.2, 1993 WL 476970, at *4 (Nov. 16, 1993) ("Where the government invites private vendors to compete for a business opportunity, the performance of which will produce a benefit to the government (such as a reduction in the government agency's own workload or some other support of the agency's mission), all elements necessary to invoke our [CICA] jurisdiction are present.").

> issue, the court also appears to have assumed that the primary purpose of a contractual transaction makes it exclusively a sale or a procurement. In our opinion, the court's view that a concession contract cannot also involve the procurement of property or services within the meaning of CICA does not take into account the specific facts of each situation.

Id. at *16-17.[4]

5. Finally, we note that when it was to the government's advantage to do so, the Department of Justice itself argued that the CDA applies to concessions contracts. See *Pound* v. *United States*, No. 94-496C (Fed. Cl. Aug. 30, 1996); App. *infra*, 95a-100a. The concessions contract at issue in *Pound* was to operate a marina on land owned by the Army Corps of Engineers. See *id.* at 98a. The government argued that the CDA applied to that concessions contract under, among other subsections, 41 U.S.C. § 602(a)(3), which covers government contracts for the repair or maintenance of real property. See Defendant's Motion To Dismiss Or, In The Alternative, For Summary Judgment Upon Count I Of The Complaint And Motion For Summary Judgment Upon Counts II And III And Defendant's Counterclaim, at 10-11 (Apr. 28, 1995), re-

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[4] Although the Comptroller General's reasoning is persuasive evidence that the CDA applies to NPS concessions contracts, we agree with the NPS that the CICA in fact does not apply to such contracts. The CICA applies to "contract[s] for the procurement of property or services" (31 U.S.C. § 3551(1)(A)), which, as the Comptroller General notes, are also contracts within the scope of the CDA. See *Starfleet Marine*, 2002 U.S. Comp. Gen. LEXIS, at *16 n.10. Like the CDA, the jurisdiction of the CICA "does not turn on whether appropriated funds are involved." *Id.* at *12. But the CICA, unlike the CDA, on its face "does not encompass procurement procedures which are otherwise expressly authorized by other statutes" (*YRT*, 28 Fed. Cl. at 392-393 (citing 41 U.S.C. § 253(a)(1))), such as the 1998 Act.

printed at App., *infra*, 100a. The government contended that the CDA was applicable because the concessioner constructed structures on and maintained the marina, in much the same way that NPS concessioners construct structures on and maintain NPS concessions.[5]

In sum, both the D.C. Circuit's decision limiting coverage of the CDA to contracts that "procure services or goods *for the government*" (App., *infra*, 27a (emphasis added)) and its determination that NPS concessions contracts fail to meet that test are contrary to the plain language and purpose of the statute and are inconsistent with the views of expert agencies. The NPS plainly procures both "services" and the "construction, alteration, repair or maintenance of real property" (41 U.S.C. § 602(a)(2)-(3)) in its concessions contracts.

B. The Decision Below Creates A Conflict In The Circuits On Whether The Contract Disputes Act Applies To Concessions Contracts.

The court of appeals' construction of the Contract Disputes Act cannot be squared with the decision of the Federal Circuit in *Total Medical Management, Inc.* v. *United States*, 104 F.3d 1314, 1320 (Fed. Cir. 1997), and of the Federal Circuit's precursor – the Court of Claims – in *Yosemite Park & Curry Co.*, 582 F.2d 552.

Total Medical Management involved agreements between the military and a private health care company to provide medical services to military dependants at an army hospital. As here, the government argued that the agreements were not subject to the CDA "because they are not procurement contracts for the benefit of the government," but instead "are solely for the benefit of the military dependents who receive the medical care." See *Total Med. Mgmt.*, 104 F.3d at 1320. The Federal Circuit rejected that argument, explaining that, "since it is clear that the government has legal obligations to military dependents and benefits by obtaining said dependents' care at a reduced cost," the agreements were procurement contracts subject to the CDA. *Ibid.*

[5] The Court of Federal Claims in *Pound* did not address substantively the applicability of the CDA, noting instead that the parties *agreed* that the Act applied. See *Pound* v. *United States*, No. 94-496C, slip op. at 1 n.1, 10 n.2 (Fed. Cl. Aug. 30, 1996).

In precisely the same way, the NPS has statutorily defined legal obligations to provide the visiting public with food, lodging, and other services in the national parks, and it has elected to discharge those duties by procuring them from concessioners rather than by furnishing them directly. See 16 U.S.C. §§ 1, 5951, 5952. See generally pages 4-6, *supra*. The decision below – that the CDA does not apply to NPS concessions contracts because their function is to "authorize third parties to provide services" rather than "to procure services or goods for the government" (App., *infra*, 27a) – is totally at odds with the Federal Circuit's view of the CDA in *Total Medical Management*.

Indeed, the NPS itself convinced the Court of Claims that concessions contracts fall within the reach of certain government procurement statutes such as the CDA. In *Yosemite Park & Curry Co.*, the concessioner argued that NPS concessions contracts were exempt from such statutes. The NPS disputed that assertion, and the court agreed with the agency. As the court explained, NPS concessions contracts will be covered by procurement statutes – assuming other statutory requirements are met – because the NPS cannot "avoid normal, legally mandated, procurement procedures" by "characteriz[ing] the procurement of * * * services for the public as the granting of a 'concession' to a specific contractor." *Yosemite Park & Curry Co.*, 582 F.2d at 558. As the court explained,

> [P]laintiff's attempted argument that a "concession" purchase is somehow different from a normal purchase because a concession contract "benefits the

> public" should * * * be accorded little weight. It is hoped that *every* Government purchase "benefits the public" in some way.

Id. at 559 n.8 (emphasis in original).[6]

Despite the fact that the NPHA expressly relied on *Total Medical Management*, *Yosemite Park & Curry Co.*, and *Oroville-Tonasket* in its briefs (see Br. Pls.-Appellants at 52, 54; Reply Br. Pls.-Appellants at 28), the court below never mentioned, much less attempted to reconcile, these conflicting decisions. Certiorari is plainly warranted to resolve this significant split of authority.

C. The Issue Presented Here Is Of Substantial Practical Importance.

This Court's review is essential because of the practical importance of the issue presented. The government contracts to purchase more than $220 billion in goods and services each year. See *Encourage Contracting Out of Federal Services: A Legislative Hearing on H.R. 3832, The Services Acquisition Reform Act of 2002 (SARA), Before the Subcomm. on Technology and Procurement Policy, House Comm. on Gov't Reform*, 107th Cong. (Mar. 7, 2002) (statement of Angela B. Styles, Administrator for Federal Procurement Policy, at 1). This case has implications not only for NPS

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[6] The Court of Federal Claims – the court to which Congress has conferred jurisdiction over CDA claims (see page 4, *supra*) – has also held that the CDA applies to concessions contracts indistinguishable from NPS concession contracts. See, *e.g.*, *Oroville-Tonasket*, 33 Fed. Cl. at 22 (concluding that contract to manage a dam providing irrigation involved both "procurement of services" and procurement of "construction, alteration, repair or maintenance of real property" for purposes of CDA because contractor operated and maintained federally-owned facility, thus fulfilling responsibilities assigned by Congress to Secretary of Interior).

concessions contracts, but also for a significant portion of *all* government procurement contracts.

As Congress explained in enacting the CDA,

> How procurement functions has a far-reaching impact on the economy of our society and on the success of many major Government programs. Both can be affected by the existence of competition and quality contractors – or by the lack thereof. The way potential contractors view the disputes-resolving system influences how, whether, and at what prices they compete for Government contract business.

S. REP. NO. 95-1118, at 4. "Prior to the CDA, the 'system' for resolving federal contract disputes can best be described as a mess." C. Kipps, T. Kindness, & C. Hamrick, *The Contract Disputes Act: Solid Foundations, Magnificent System* ("*Solid Foundations*"), 28 PUB. CONT. L.J. 585, 585 (1999). Thus, the CDA was passed with the express purposes of standardizing government contracting systems and providing contractors with an independent method to adjudicate disputes, thus freeing them from "[t]he predilections of different agencies." S. REP. NO. 95-1118, at 3.

The CDA has been a great success, hailed as "a remarkable milestone in the field of government contracts for several reasons, including the fact that it lifted the disputes process out of the discretionary realm of agency clauses and placed the process squarely within a fixed statutory framework." *Solid Foundations*, *supra*, at 591. The CDA has "worked exceedingly well" for the past two decades. *Id.* at 585. In the sole previous instance when the courts significantly limited the scope of the CDA – by proclaiming restrictive rules for "certifying" a claim – Congress eventually stepped in to overrule that cramped interpretation. See *id.* at 592-595. Rather than rely on Congress, in this instance the Court should grant certiorari to resolve the confusion in the circuits over the coverage of the CDA and to correct the

lower court's unduly narrow reading of the statute. Cf. *United States* v. *Utah Constr. & Mining Co.*, 384 U.S. 394, 400 (1966) (Court granted certiorari "because of the importance of [questions about the coverage of government contract disputes clause] in the administration of government contracts").

The decision below – exempting government contracts that benefit third parties from the scope of the CDA – undermines the CDA's goals of consistency and external accountability and threatens a return to the messy system of yesteryear, when "contractors were caught in an irrational patchwork system that limited their access to court, failed to provide adequate due process protections, and often resulted in substantial delays." *Solid Foundations*, *supra*, at 587. As *Total Medical Management*, *Oroville-Tonasket*, and *Pound* demonstrate, the NPS is far from unique in relying on concessions contracts to fulfill significant portions of its statutory mission.[7] The decision below could affect all such concessions contracts. Even *uncertainty* about whether concessions contracts include the protections of the CDA is, from the perspective of a contractor, almost as bad as not having such protections at all. Yet the D.C. Circuit's amorphous "benefits-third-parties" exception makes it difficult or impossible for agencies and contractors alike to determine whether a specific contract is covered by the CDA, or if instead its benefits inure to third parties to such an extent that the CDA does not apply.

The decision below also creates an incentive for agencies that would rather not expose their contracting decisions to a

[7] See also, *e.g.*, *Harry Pohl KG*, ASBCA No. 51523, 01-1 BCA ¶ 31,329, 2001 ASBCA LEXIS 40 (Feb. 28, 2001); *Home Entm't, Inc.*, ASBCA No. 50791, 99-2 BCA ¶ 30,550, 1999 ASBCA LEXIS 126 (Aug. 23, 1999); *Senor Tenedor, S.A. de C.V.*, ASBCA Nos. 48502 *et al.*, 97-2 BCA ¶ 29,192, 1997 ASBCA LEXIS 150 (Aug. 15, 1997).

neutral arbiter to design their contracting programs in such a way that the CDA would not apply. Because it could be argued that any government service contract benefits the persons served – even if fulfilling a statutory mandate – the unifying protections and procedures afforded to a large percentage of government contracts could unravel quickly.

Finally, the decision below has significant implications for the well-being of the Nation's national parks. Under the regulation at issue, NPS concessioners are denied neutral arbiters in any dispute they may have with the NPS, which "influences how, whether, and at what prices they compete for Government contract business." S. REP. NO. 95-1118, at 4. The lack of protection afforded by the CDA will damage the public-private partnership that long has served visitors to the national parks and fulfilled the statutory mandate of 16 U.S.C. § 1 (see pages 4-5, *supra*), in ways that may significantly undermine the public's ability to enjoy these national treasures.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

APPENDIX A

United States Court of Appeals,
District of Columbia Circuit.

AMFAC RESORTS, L.L.C., *Appellant*,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL., *Appellees*.

Nos. 01-5223, 01-5226, 01-5229 and 01-5233.

Argued Nov. 6, 2001.

Decided March 1, 2002.

Rehearing and Rehearing En Banc Denied May 8, 2002.

Before: RANDOLPH and GARLAND, Circuit Judges, and WILLIAMS, Senior Circuit Judge.

Opinion for the Court filed by Circuit Judge RANDOLPH.

RANDOLPH, Circuit Judge:

These are four consolidated cases on appeal from the judgment of the district court sustaining regulations of the National Park Service governing concession contracts in the National Park System. Many of the issues are tied to the history of the National Park System and the functions concessioners perform in the operation of the parks.

The history begins with the discovery of "Old Faithful" and the other natural wonders of what is now Yellowstone National Park. In 1872, Congress withdrew the land at the headwaters of the Yellowstone River from "settlement, occupancy, or sale," thus creating the first national park in the United States. Act of Mar. 1, 1872, ch. 24, § 1, 17 Stat. 32. *See also* AUBREY L. HAINES, YELLOWSTONE NATIONAL PARK: ITS EXPLORATION AND ESTABLISHMENT (1974). Not everyone had been enthusiastic about the plan to create Yel-

lowstone National Park. A local newspaper editorial worried that "the effect of this measure will be to keep the country a wilderness, and shut out, for many years, the travel that would seek that curious region if good roads were opened through it and hotels built therein." HAINES, *supra*, at 127 (quoting the HELENA DAILY HERALD of Mar. 1, 1872). In the final legislation, Congress responded by authorizing the Secretary of the Interior to lease portions of the park for "the erection of buildings for the accommodation of visitors." 17 Stat. 33.

As the United States withdrew more areas from the public domain, it continued to favor the interests of park visitors. In creating the National Park Service in 1916, Congress authorized the Interior Secretary to "grant privileges, leases, and permits for the use of land for the accommodation of visitors" to each of the "various parks, monuments, or other reservations" under the Secretary's authority. An Act to Establish a National Park Service, ch. 408, 39 Stat. 595 (1916). In the view of the first director of the Park Service, Stephen Mather: "Scenery is a hollow enjoyment to a tourist who sets out in the morning after an indigestible breakfast and a fitful sleep in an impossible bed." Dennis J. Herman, *Loving Them to Death: Legal Controls on the Type and Scale of Development in the National Parks*, 11 STAN. ENVTL. L. J. 3, 3 (1992).

During its first thirty years, the Park Service followed internal regulations and policies governing concessioners and their obligations to park visitors and to the national park lands. The government also offered financial inducements to private contractors to convince them to provide and operate facilities in what were often remote locations. *See Park Concession Policy: Hearings Before the Subcomm. on National Parks of the House Comm. on Interior and Insular Affairs*, 88th Cong. 5-8 (1964) [hereinafter *Park Concession Policy Hearings*] (letter from John A. Carver, Jr., Assistant Secretary of the Interior).

For our purposes the most significant of these incentives was a preferential right of renewal, which "contemplated that every existing contract covering public operations [in the national parks] will be renewed at the expiration thereof, provided, of course, that full and satisfactory service to the public had been given thereunder." Memorandum for the Acting Under Secretary, U.S. Department of the Interior (Aug. 10, 1940). When the Interior Department sought to change its policies and withdraw some of these financial incentives in the late 1940s, the concessioners and some in Congress balked. *See* H.R. RES. 66, 81st Cong. (1950), passed by the Comm. on Public Lands and included in H.R. REP. NO. 81-3133, at 5-6 (1950). In response, the Secretary announced new guidelines for concession contracts and preserved many of the existing financial incentives for concessioners, including the preferential right of renewal. *Id.* at 4-5. The House Committee on Public Lands passed a resolution endorsing these new guidelines, although the resolution of course had no legal effect. *INS* v. *Chadha*, 462 U.S. 919 (1983).

By the 1960s, other House committees started expressing doubt about the soundness of the Interior Department's contracting policies, particularly the financial incentives it was giving concessioners. See HOUSE COMM. ON GOVERNMENT OPERATIONS, SURVEY OF SELECTED ACTIVITIES, H.R. REP. NO. 88-306, pt. 3, at 4-12 (1963) ("The committee's inquiry disclosed considerable weakness in the National Park Service's operations in several matters involving concessioners in the national parks."). When Congress considered the 1964 appropriations bill for the Department of the Interior, the House Committee on Appropriations recommended that "competitive bidding should be required for concession contracts, in lieu of the current practice of granting preferential opportunities to existing concessioners to negotiate new contracts." DEPARTMENT OF THE INTERIOR AND RELATED

AGENCIES APPROPRIATION BILL, H.R. REP. NO. 88-177, at 10 (1963).

Concerned that "certain other committees that do not have jurisdiction" had "attempted to get into the problem of concessions," the House Committee on Interior and Insular Affairs produced a bill to "put into statutory form" the long-standing concessions policies of the Park Service, including the preferential right of renewal. H.R. REP. NO. 89-591, at 1 (1965); *Park Concession Policy Hearings* at 19. In 1965, these concession policies were enacted into law. *See* 111 CONG. REC. 23,632-48 (1965). Part of the legislation provided that the "Secretary [of the Interior] shall ... giv[e] preference in the renewal of contracts or permits and in the negotiation of new contracts or permits to the concessioners who have performed their obligations ... to the satisfaction of the Secretary." National Park Service Concessions Policy Act, Pub. L. No. 89-249, § 5, 79 Stat. 969, 970 (1965), *repealed by* National Parks Omnibus Management Act of 1998, Pub. L. No. 105-391, § 415(a), 112 Stat. 3497, 3515. The preference gave "incumbent concessioners, upon renewal, the right to meet any better offer received" by the Park Service. U.S. DEP'T OF THE INTERIOR, REPORT OF THE TASK FORCE ON NATIONAL PARK SERVICE CONCESSIONS 10 (1990).

The 1965 Act governed all concession contracts entered into by the Park Service. Concessioners paid the government a franchise fee, typically less than five percent of gross revenues, for the privilege of operating on federal land. If they used government-owned facilities they paid an additional fee.

In 1998, after several aborted attempts, Congress repealed the preferential right of renewal and enacted other rules governing concession contracts. National Parks Omnibus Management Act of 1998, 16 U.S.C. §§ 5951-5966.

Plaintiffs are three companies who have current concessions contracts with the Park Service and an association of concessioners. They brought four separate actions challenging the Park Service regulations, issued in 2000, to implement the 1998 Act. 65 Fed. Reg. 20,630 (Apr. 17, 2000) (to be codified at 36 C.F.R. pt. 51). The district court consolidated the four lawsuits, and granted summary judgment to the government on all of the claims save one (which has not been appealed to this court). *Amfac Resorts* v. *United States Dep't of the Interior*, 142 F. Supp. 2d 54 (2001).

I.

The first issue centers on the 1998 Act's repeal of the statutory preferential right of renewal in § 5 of the 1965 Act. The 1998 Act provided that, except for small contracts and outfitter and guide services, "the Secretary shall not grant a concessioner a preferential right to renew a concessions contract." 16 U.S.C. § 5952(7). A savings clause in the 1998 Act, § 415(a), states: "repeal of [the 1965 Act] shall not affect the validity of any concessions contract or permit entered into under such Act, but the provisions of this title shall apply to any such contract or permit except to the extent such provisions are inconsistent with the terms and conditions of any such contract or permit." Pub. L. No. 105-391, § 415(a), 112 Stat. 3497, 3515 (1998).

The Park Service interpreted the repealing and the savings clauses in the following narrative regulation:

> **§ 51.102 What is the effect of the 1998 Act's repeal of the 1965 Act's preference in renewal?**
>
> (a) Section 5 of the 1965 Act required the Secretary to give existing satisfactory concessioners a preference in the renewal (termed a "renewal preference" in the rest of this section) of its concession contract or permit. Section 415 of the 1998 Act repealed this statutory renewal preference as of November 13, 1998. It is the final decision of the Director, subject to the right of appeal set forth in paragraph (b) of this section, that holders of 1965 Act concession

contracts are not entitled to be given a renewal preference with respect to such contracts (although they may otherwise qualify for a right of preference regarding such contracts under Sections 403(7) and (8) of the 1998 Act as implemented in this part). However, if a concessioner holds an existing 1965 Act concession contract and the contract makes express reference to a renewal preference, the concessioner may appeal to the Director for recognition of a renewal preference.

(b) Such appeal must be in writing and be received by the Director no later than thirty days after the issuance of a prospectus for a concession contract under this part for which the concessioner asserts a renewal preference. The Director must make a decision on the appeal prior to the proposal submission date specified in the prospectus. Where applicable, the Director will give notice of this appeal to all potential offerors that requested a prospectus. The Director may delegate consideration of such appeals only to a Deputy or Associate Director. The deciding official must prepare a written decision on the appeal, taking into account the content of the appeal and other available information.

(c) If the appeal results in a determination by the Director that the 1965 Act concession contract in question makes express reference to a renewal preference under section 5 of the 1965 Act, the 1998 Act's repeal of section 5 of the 1965 Act was inconsistent with the terms and conditions of the concession contract, and that the holder of the concession contract in these circumstances is entitled to a renewal preference by operation of law, the Director will permit the concessioner to exercise a renewal preference for the contract subject to and in accordance with the otherwise applicable right of prefer-

ence terms and conditions of this part, including, without limitation, the requirement for submission of a responsive proposal pursuant to the terms of an applicable prospectus. The Director, similarly, will permit any holder of a 1965 Act concession contract that a court of competent jurisdiction determines in a final order is entitled to a renewal preference, for any reason, to exercise a right of preference in accordance with the otherwise applicable requirements of this part, including, without limitation, the requirement for submission of a responsive proposal pursuant to the terms of an applicable prospectus.

36 C.F.R. § 51.102 (2001).

The Park Service thus will not recognize a preferential right of renewal for concessioners whose pre-1998 contracts are expiring, unless the contract expressly so provides. *See* 65 Fed. Reg. at 20,631-33. In the language of the savings clause of § 415(a), without such contractual "terms and conditions" it would not be "inconsistent" — as the Park Service sees it — to refuse to allow a preferential right of renewal.

A typical concession contract runs for 15 or 20 years. REPORT OF THE TASK FORCE ON NATIONAL PARK SERVICE CONCESSIONS, *supra*, at 5. One of the plaintiffs, Amfac Resorts, L.L.C., had a 30-year contract for the Grand Canyon. A right of renewal for pre-1998 contracts is therefore a matter of great interest to those holding these contracts. The concessioners say that the renewal provision of the 1965 Act represented an "entrenched policy"; that the policy was incorporated by law as an unwritten term in every concession contract signed between 1965 and 1998; and that the Park Service regulation violates § 415 of the 1998 Act (the savings clause) because it allows a preferential right of renewal only if contracts before the 1998 Act expressly so state.

A.

The concessioners' argument in favor of an "implied" right of renewal initially rests on the "*Christian* doctrine," named after *G.L. Christian & Assocs.*, 312 F.2d 418, 424 (Ct. Cl. 1963). As they explain it, the doctrine requires "that longstanding and deeply-ingrained agency policies, such as the [Park Service's] entrenched policy of granting concessioners renewal rights in exchange for concessioner investments, form a mandatory part of all government contracts." Brief for Appellants at 21.

The Federal Circuit has, on occasion, concluded that certain statutory or regulatory provisions may become part of a government contract even though the contract does not contain language to that effect. *See S.J. Amoroso Constr. Co.* v. *United States*, 12 F.3d 1072, 1075 (Fed. Cir. 1993); *General Engineering & Machine Works* v. *O'Keefe*, 991 F.2d 775, 779 (Fed. Cir. 1993).

Our court has never adopted the Federal Circuit's *Christian* doctrine. Even if we did so, it would boot the concessioners nothing. In describing the doctrine, they have omitted a crucial element. The Federal Circuit does not hold that significant or important federal policies "form part of government contracts even where absent from those contracts' explicit text." Brief for Appellants at 22. If that were the law, Congressional power to make adjustments in legislation would be greatly constricted. Statutory provisions would live on as part of long-term contracts well after their repeal or modification. This is why, as the Supreme Court put it in *Dodge v. Board of Education*, 302 U.S. 74, 79 (1937), there is a "presumption" that "a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise." To this the Court added in *Nat'l R.R. Passenger Corp.* v. *Atchison, Topeka & Santa Fe Ry.*, 470 U.S. 451, 465-66 (1985) [hereinafter *Atchison*]: "Policies, unlike contracts, are inherently subject to revision and repeal, and to construe laws as contracts when the obligation is not clearly and unequivocally expressed would be to limit drastically the essential powers of a legislative body." It is true, as the concessioners point out, that the holding of *Atchison* was that a statute did not itself create a contract. Reply Brief for Appellants at 12. But it is not true that the case is therefore "irrelevant." *Id.* The Court's reasoning applies equally to claims, such as the concessioners', that a statute (here the 1965 Act) created a contractual obligation in all contracts executed before its repeal. *See General Motors Corp.* v. *Romein*, 503 U.S. 181, 190 (1992).

One element of the *Christian* doctrine, the element missing from the concessioners' statement of the law, saves it from contradicting this line of Supreme Court authority. According to the Federal Circuit, it is not enough that the legislative or regulatory provision is important or significant (assuming one could make such rankings). To constitute a contractual obligation even though not written in the contract, the provision must be a mandatory contract clause, a clause the legislation — or as in *Christian*, 312 F.2d at 424, the regulation — requires to be included in contracts. Thus, "a mandatory contract clause that expresses a significant or deeply ingrained strand of public procurement policy is considered to be included in a contract by operation of law." *S.J. Amoroso Constr. Co.* v. *United States*, 12 F.3d at 1075. And the *Christian* doctrine "applies to mandatory contract clauses which express a significant or deeply ingrained strand of public procurement policy." *General Engineering & Machine Works* v. *O'Keefe*, 991 F.2d at 779.

The renewal provision contained in § 5 of the 1965 Act was by no stretch a mandatory contract term. The Secretary's contracting authority was derived from a different part of the 1965 Act — § 3, which authorized the Secretary to "include in contracts" such "terms and conditions as, in his judgment, are required to assure the concessioner of adequate

protection against loss of investment ... resulting from discretionary acts, policies, or decisions of the Secretary occurring after the contract has become effective....." § 3, 79 Stat. 969. Section 5 of the 1965 Act was of another sort. It stated that the Secretary "shall ... giv[e] preference in the renewal of contracts or permits...." § 5, 79 Stat. 970. Rather than leaving the matter to individual negotiations, § 5 required the Secretary to grant a right of renewal to all concessioners, regardless of the terms of their individual concession contracts. The provision thus constituted "legislation which merely declares a state policy, and directs a subordinate body to carry it into effect." *Dodge* v. *Bd. of Educ.*, 302 U.S. at 78. We agree with the district court that if § 5 meant that the Secretary had to insert a preferential right of renewal clause in all concession contracts, one would have expected a direction, or at least an authorization, to this effect. 142 F. Supp. 2d at 72. There is none.

It is possible that some parties nevertheless insisted on having a right of renewal written into their contracts and that the Secretary yielded. Possible, but not likely. The concessioners have identified no such contract and the Park Service is aware of none. 65 Fed. Reg. at 20,664. The Service's standard-form concession contract, in effect from 1965 to 1998, contained no right-of-renewal clause. *See* 65 Fed. Reg. at 20,632. The regulation under the 1998 Act nevertheless allows for the possibility and, in compliance with the saving clause, states that if a concession contract contains an express right of renewal the Secretary will honor it. 36 C.F.R. § 51.102(c) (2000).

B.

Apart from the *Christian* doctrine, each of the concessioners maintains that the Park Service's regulation is "facially invalid because [it denies] altogether the *possibility* of implied contractual rights in individual cases" and prevents "any concessioner in a future proceeding from offering specific evidence of a bargained-for and mutually-agreed upon contractual renewal right. If even one concessioner has such evidence, the regulations denying those rights across-the-board are unlawful." Brief for Appellants at 26, 27. In other words, although the regulation is valid as applied to dozens of concession contracts, it is invalid because of the possibility that one concessioner might have an implied — that is, an unwritten — preferential right of renewal. The argument, aimed at the validity of the regulation on its face, does not accurately state the law.

In *United States* v. *Salerno*, 481 U.S. 739, 745 (1987), the Supreme Court stated:

> A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that the [statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an "overbreadth" doctrine outside the limited context of the First Amendment.

Justice Stevens believes that only the second sentence of the *Salerno* excerpt states the governing principle for facial challenges. He and Justice Scalia have debated whether the first sentence from *Salerno* — what has become known as the "no-set-of-circumstances" test — is instead controlling. *See City of Chicago* v. *Morales*, 527 U.S. 41, 55 (1999) (plurality opinion by Stevens, J., joined by Justices Souter and Ginsburg); *id.* at 74-83 (Scalia, J., dissenting). *See also Anderson* v. *Edwards*, 514 U.S. 143, 155 n.6 (1995); *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 318 (2000) (Rehnquist, C.J., joined by Justices Scalia and Thomas, dissenting). For our part, we have invoked *Salerno's* no-set-of-circumstances test to reject facial constitutional challenges.

See, e.g., James Madison Ltd., by Hecht v. *Ludwig*, 82 F.3d 1085, 1101 (D.C.Cir.1996); *Chemical Waste Mgmt., Inc.* v. *EPA*, 56 F.3d 1434, 1437 (D.C.Cir.1995); *Steffan* v. *Perry*, 41 F.3d 677, 693 (D.C.Cir.1994) (en banc).

The facial attack on § 51.102 is not, of course, on the basis that the regulation is unconstitutional. The claim is that § 51.102 conflicts with § 415 of the 1998 Act. In *National Mining Ass'n* v. *Army Corps of Engineers*, 145 F.3d 1399, 1407 (D.C.Cir.1998), we declined to adopt the *Salerno* test in a comparable case, stating that the "Supreme Court has never adopted a 'no set of circumstances' test to assess the validity of a regulation challenged as facially incompatible with governing statutory law."

Our examination of Supreme Court precedent in *National Mining* apparently overlooked *Reno* v. *Flores*, 507 U.S. 292 (1993). There a class of alien juveniles, arrested on suspicion of being deportable and then detained pending deportation hearings, claimed that a regulation preventing their release except to close relatives violated the Due Process Clause and conflicted with the underlying statute. The Court, speaking through Justice Scalia, described the case as involving only a facial challenge to the regulation and then held as follows: "To prevail in such a facial challenge, respondents 'must establish that no set of circumstances exists under which the [regulation] would be valid.' *United States* v. *Salerno*, 481 U.S. 739, 745 (1987). That is true as to both the constitutional challenges, see *Schall* v. *Martin*, 467 U.S. 253, 268 (1984), and the statutory challenge, see [*INS* v. *National Center for Immigrants' Rights*, 502 U.S. 183, 188 (1991) [hereinafter NCIR]]." 507 U.S. at 301. *See Public Lands Council* v. *Babbitt*, 167 F.3d 1287, 1301 (10th Cir.1999) (applying the *Reno* v. *Flores* formulation to a statutory challenge to a regulation). *Cf. Pharmaceutical Research & Mfrs.* v. *Concannon*, 249 F.3d 66, 77 (1st Cir.2001) (applying *Salerno* in a preemption case). *See also* Marc E. Isserles, *Overcoming*

Overbreadth: Facial Challenges and the Valid Rule Requirement, 48 AM. U. L. REV. 359, 405 (1998).

When an intervening Supreme Court decision alters the law of the circuit, a panel of our court must follow the Court's decision in all later cases. *See, e.g., McKesson Corp.* v. *Islamic Republic of Iran*, 52 F.3d 346, 350 (D.C.Cir.1995); *National Treasury Employees Union* v. *FLRA*, 30 F.3d 1510, 1516 (D.C.Cir.1994). But here the Supreme Court decision was not intervening; it was rendered before *National Mining*. Whether despite *Reno* v. *Flores*, *National Mining* therefore must stand as circuit law unless and until the full court overrules it is a question unnecessary for us to answer. *See LaShawn A.* v. *Barry*, 78 F.3d 1389, 1395 (D.C.Cir.1996) (en banc). *National Mining* dealt only with the no-set-of-circumstances formulation of *Salerno*. It did not mention NCIR, the opinion cited in *Reno* v. *Flores* for the proposition that *Salerno* applied to statutory challenges. Justice Stevens, writing for the Court in NCIR, held: "That the regulation may be invalid as applied in some cases, however, does not mean that the regulation is facially invalid because it is without statutory authority." 502 U.S. at 188. *NCIR*, without citing *Salerno*, echoed in a non-constitutional setting the sentence in *Salerno* following the no-set-of-circumstances test — "The fact that the [statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid," 481 U.S. at 745. *See Janklow* v. *Planned Parenthood*, 517 U.S. 1174 (1996) (memorandum of Stevens, J., on denial of certiorari).

Either formulation — the no-set-of-circumstances test adopted from *Salerno* in *Reno* v. *Flores*, or the less strict NCIR standard — may pose potential problems for judicial review of agency regulations, especially in this circuit. Lacking a rulemaking record containing evidence relating to the rule's application to a particular entity, petitioners ordinarily mount only facial attacks, often on the ground that the agency's product conflicts with the statute. In such cases, the

consequence of upholding the regulation because it is not invalid in all its applications (*Reno* v. *Flores*), or because it is invalid in only some of its applications (*NCIR*), may be that petitioners would have to make their challenge in another circuit and in another setting, in defense of an enforcement action for instance. Some of the statutes governing jurisdiction prescribe a specific time period for judicial review of regulations, restrict venue to our circuit, and may prohibit review outside the time period, except in limited circumstances. *See, e.g.*, *Clean Air Act*, 42 U.S.C. § 7607(b); Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9613(a); *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275 (1978); *United States* v. *Ethyl Corp.*, 761 F.2d 1153 (5th Cir.1985); Frederick Davis, *Judicial Review of Rulemaking: New Patterns and New Problems*, 1981 DUKE L.J. 279, 285-90. Although one court has held that the Clean Air Act, 42 U.S.C. § 7607(b), deprived it of jurisdiction to review EPA regulations when they are applied, *see Potomac Elec. Power Co.* v. *EPA*, 650 F.2d 509, 513 (4th Cir.1981), we have ruled that preclusion must be explicit for review to be barred in an enforcement action, *see Indep. Cmty. Bankers of Am.* v. *Bd. of Governors of Fed. Reserve Sys.*, 195 F.3d 28, 34 (D.C.Cir.1999), and that even express preclusion may not operate when the issue would have been unripe during the period of statutory review. *See Clean Air Implementation Project* v. *EPA*, 150 F.3d 1200, 1204 (D.C.Cir.1998). Perhaps the congressional intent reflected in judicial review provisions such as § 7607(b) of the Clean Air Act may also demand adjustments in the *Reno* v. *Flores* or *NCIR* test for reviewing facial attacks on regulations, assuming the tests are not constitutionally compelled. *See City of Chicago* v. *Morales*, 527 U.S. at 77 (Scalia, J., dissenting).

Whatever the outcome in such cases, the situation here is not comparable. Our circuit does not have exclusive jurisdiction over Park Service regulations, and judicial review is not

confined to a particular time period. Nothing would preclude a concessioner from bringing an action for a declaratory judgment that the regulation, as applied to the concessioner, deprives it of a contractual right in violation of the savings clause. In fact, one of the consolidated actions in the district court was such a suit. Amfac's complaint alleged that its 1969 contract for the Grand Canyon was about to expire, that the contract contained an implied preferential right of renewal arising "from the circumstances of the formation of the 1969 contract," that the Park Service's regulation denied the existence of such an implied term, and that the regulation as applied to Amfac therefore violated § 415 of the 1998 Act. Although § 51.102 may be valid on its face, this would not necessarily doom Amfac's as-applied challenge.

With this in mind, we return to the concessioners' assertion that if "even one concessioner has [evidence showing an implied right of renewal], the regulations denying those rights across-the-board are unlawful." Brief for Appellants at 27. We do not need to choose between *Reno* v. *Flores* or *NCIR* to dispose of that contention. Not even First Amendment overbreadth analysis — which embodies a far more difficult standard for laws to satisfy than the one the Court formulated in *Salerno* — would render a law facially invalid because of the prospect of a single invalid application. An overbreadth attack will succeed only if the legislation is substantially overbroad — that is, only if the law "reaches a substantial number of impermissible applications." *New York* v. *Ferber*, 458 U.S. 747, 771 (1982). That there might be one invalid application is therefore far from enough to make the regulation unlawful under any of the standards we have mentioned.

Perhaps recognizing as much, the concessioners assert that "*some* contracts might *as a factual matter* include the [renewal] right as a bargained-for term," a "possibility" (despite obstacles posed by the parol evidence rule and perhaps statutes of fraud) they think is enough to render the regula-

tion unlawful. Brief for Appellants at 29. But far more is demanded before a regulation may be declared facially invalid. Under *Reno* v. *Flores*, § 51.102 must of course be sustained on its face because there are circumstances in which applying the regulation would not be inconsistent with § 415 of the 1998 Act. The regulation's requirement of an express contract term, for instance, properly eliminates claims of an implied renewal right based on the *Christian* doctrine alone. Even under the more relaxed standard of *NCIR*, it is not enough that "*some* contracts might *as a factual matter*" contain an implied renewal right. To repeat, that "the regulation may be invalid as applied in some cases, however, does not mean that the regulation is facially invalid because it is without statutory authority." *NCIR*, 502 U.S. at 188. We therefore reject the concessioners' facial attack on § 51.102.

In reaching this result we have followed a course different than that of the district court. We should explain why. The district court thought the "lawfulness of the defendants' regulations turns on whether the plaintiffs each have a contractual right to preference renewal." 142 F. Supp. 2d at 71. With this we agree. We also agree — as our discussion of the *Christian* doctrine indicates — with the district court's conclusion that the 1965 Act did not itself confer a contractual renewal right on the concessioners. *Id.* at 72. As to the concessioners' allegations that they had an implied-in-fact contract embodying their right of renewal, the court rejected these claims on the basis that "the administrative record provides no indication that the parties had the *mutual* understanding that the contract contained the renewal terms." *Id.* at 73. (The court must have had in mind all existing concession contracts, not just one.) The court added that the administrative record "is wholly devoid of information suggesting that the [Park Service] *intended* the renewal term to be part of the contract." *Id.* But that is entirely understandable in light of the fact that the Park Service's proposed rule dealing with rights of renewal did not contain the restriction requiring the renewal right to be spelled out as an express term. *See* Concessions Contracts, 64 Fed. Reg. 35,516, at 35,535 (proposed June 30, 1999). The concessioners thus had no reason to submit evidence of implied renewal rights in each of their contracts, assuming this sort of evidence would have been allowed in the rulemaking proceeding or could have been mustered. Moreover, the Park Service never indicated that its final regulation rested on the district court's rationale. *See SEC* v. *Chenery*, 332 U.S. 194, 196 (1947). After denying that the right could be inferred from the 1965 Act, the Park Service explained that an implied renewal right "is inconsistent with the express terms of almost all current NPS concession contracts," 65 Fed. Reg. at 20,633. Most contracts, according to the Park Service, contained a provision along these lines:

> This Contract [or permit] and the administration of it by the Secretary shall be subject to the laws of Congress governing the Area and rules, regulations and policies whether now in force or hereafter enacted or promulgated.

Id. But that begs the question the concessioners posed here (and in the rulemaking, *see* Comments of the National Park Hospitality Ass'n at 23 (Oct. 14, 1999)). The savings clause of the 1998 Act is one of the "laws of Congress" to which this contractual provision refers. If a concessioner has an implied right of renewal in a pre-1998 contract, the savings clause preserves it. The Park Service does not deny the possibility of an implied contractual provision — that is, an unwritten one — in government contracts. See Willard L. Boyd, III & Robert K. Huffman, *The Treatment of Implied-in-Law and Implied-in-Fact Contracts and Promissory Estoppel in the United States Claims Court*, 40 CATH. U. L. REV. 605 (1991); Michael C. Walch, Note, *Dealing with a Not-so-Benevolent Uncle: Implied Contracts with Federal Government Agencies*, 37 STAN. L. REV. 1367 (1985). The district court, quoting *Hercules, Inc.* v. *United States*, 516

U.S. 417, 424 (1996), summarized the law on the subject: an implied-in-fact contract requires a meeting of the minds, which may be inferred from the "conduct of the parties showing, in light of the surrounding circumstances, their tacit understanding." The concessioners alleged that there have been such meetings of the mind, at least in some instances. Nonetheless, we agree with the district court that the regulation is facially valid. As we explained earlier, the possibility that one or some concessioners had an implied-in-fact renewal right is not a sufficient basis for holding § 51.102 of the regulations invalid on its face.

This still leaves the allegations in Amfac's complaint that § 51.102 was inconsistent with the savings clause of the 1998 Act as applied to Amfac's concession contract for the Grand Canyon. Complaint of Amfac Resorts at ¶¶ 21, 41. Amfac entered into that contract in 1969. The contract expired on December 31, 2001, after the district court's judgment. Amfac turned out to be the only offeror and so the government argues that its as-applied challenge to the right-of-renewal regulation is moot: "Amfac can have no 'preference' for [the Park Service] to consider when there are no other offerors." Brief for Appellees at 33. Even if Amfac eventually won the Grand Canyon contract, a subject about which we are not informed, we do not believe its as-applied challenge would necessarily be moot. Amfac argues that because § 51.102 threw its alleged implied renewal right in doubt, it "was forced to bid more generously for the Grand Canyon contract than it otherwise would have." Reply Brief for Appellants at 16. If this assertion can be proven, *see Lujan* v. *Defenders of Wildlife*, 504 U.S. 555 (1992), then Amfac continues to suffer an injury and the case is not moot. *See Scheduled Airlines Traffic Offices* v. *Dep't of Def.*, 87 F.3d 1356, 1358 (D.C.Cir.1996).

Amfac can succeed in its claim that the regulation is invalid as-applied to its 1969 Grand Canyon contract only if it can prove the essential predicate — that the regulation, in

contradiction to the savings clause of the 1998 Act, deprived it of a contractual right. Amfac therefore should be allowed to adduce proof of its alleged implied right of renewal and should be permitted reasonable discovery to this end. The district court refused to allow any discovery on the ground that judicial review of the regulation must be confined to the administrative record, except in limited circumstances not presented here. 143 F. Supp. 2d at 10-13. *See Am. Bankers Ass'n* v. *Nat'l Credit Union Admin.*, 271 F.3d 262, 266-67 (D.C.Cir.2001); *Esch* v. *Yeutter*, 876 F.2d 976, 991-92 (D.C.Cir.1989). We said in *American Bankers*, with respect to a claim that a regulation conflicted with a statute, that the court did not even need the administrative record to determine the validity of the regulation. 271 F.3d at 266-67. But we were speaking there of a facial attack on the regulation. We agree with the district court's denial of discovery to that extent. Amfac's as-applied claim is another matter. Its evidence of an implied renewal right would not be presented to show what the Park Service did or did not consider in promulgating § 51.102 of the regulations. It would be presented instead to show that the regulation would deprive it of a contractual right in contravention of the savings clause in the 1998 Act. In this respect, the evidence Amfac proposes to adduce is akin to proof of its injury. Those challenging agency action must establish that they have standing and to do this, they must prove that the action causes injury to them. *Lujan*, 504 U.S. at 560-61. They are not confined to the administrative record. Far from it. Beyond the pleading stage, they must support their claim of injury with evidence. *Id.* So here. In mounting an as-applied challenge to a regulation, whether in defense of an enforcement action or as here in an action for a declaratory judgment, the party making the challenge may — indeed, in most instances must — present evidence outside the administrative record to show why its particular circumstances render the regulation unlawful.

We therefore reverse the district court's grant of summary judgment on Amfac's as-applied challenge to the prospectus for concessions at the Grand Canyon National Park. In doing so, we recognize that one of the claims of another plaintiff, Hamilton Stores, Inc., might be construed as an as applied challenge similar to that of Amfac. Complaint of Hamilton Stores, Inc. at ¶ 21. But the concessioners' brief presents no argument to this effect; in fact, neither the concessioners' brief nor their reply brief even mentions this portion of the Hamilton Stores complaint. We thus view the claim, which the district court rejected, as having been waived on appeal. *See, e.g., Doe* v. *Dist. of Columbia*, 93 F.3d 861, 875 n.14 (D.C.Cir.1996) (per curiam).

II.

A.

The 1998 Act, as did the 1965 Act, recognized that the United States owns all capital improvements constructed on federal land within the National Park System. 16 U.S.C. § 5954(d). Nonetheless, the 1998 Act gave concessioners a "leasehold surrender interest" in any "capital improvement" the concessioner "constructs" "pursuant to a concession contract." 16 U.S.C. § 5954(a). The Act defines "capital improvement" as "a structure, fixture, or nonremovable equipment provided by a concessioner pursuant to the terms of a concession contract." 16 U.S.C. § 5954(e). When the concession contract expires or is terminated, the incumbent is entitled to receive from its successor (or the government) the value of this interest. 16 U.S.C. § 5954(c). The amount of each concessioner's "leasehold surrender interest" — or, as the parties call it, LSI — is "equal to the initial value (construction cost of the capital improvement), increased (or decreased)" by a percentage measured by the Consumer Price Index, less depreciation. 16 U.S.C. § 5954(a)(3). If the expiring concession contract is renewed, the concessioner's LSI carries over. 16 U.S.C. § 5954(b).

The plaintiff-concessioners are unhappy with the Park Service's regulations implementing these and other LSI provisions of the 1998 Act. They say that "'capital improvement' is a well-recognized technical accounting term that all companies, as a matter of financial reporting, tax accounting, and sound business practice use to distinguish upgrades to facilities from ordinary 'repair and maintenance' costs." Brief for Appellants at 41. For support they cite an affidavit from an accountant submitted by Amfac in the district court. But the district court refused to consider, in this facial challenge, affidavits not submitted as part of the administrative record, 142 F. Supp. 2d at 73, and so shall we. Concessioners have not attempted to show why affidavits outside the agency record should be considered. See Steven Stark & Sarah Wald, *Setting No Records: The Failed Attempt to Limit the Record in Review of Administrative Action*, 36 ADMIN. L. REV. 333, 341-54 (1984). Still, we may acknowledge the standard accounting definition of capital expenditure — an expenditure that extends the useful life of the asset or increases the asset's value, and is not repair and maintenance. Whether an expenditure fits within the first category and thus must be depreciated or amortized, or the other category and thus must be expensed, often calls for difficult, fact-intensive judgments. *See* GLENN A. WELSCH & CHARLES T. ZLATKOVICH, INTERMEDIATE ACCOUNTING 443-46 (8th ed.1989); GARY L. SCHUGART, ET AL., SURVEY OF ACCOUNTING 197-212 (6th ed.1988); GLENN A. WELSCH & DANIEL G. SHORT, FUNDAMENTALS OF FINANCIAL ACCOUNTING 448-49 (5th ed.1987). As to tax accounting, which the concessioners invoke without any citation to the law, we think this is entirely beside the point. The tax code states that no deduction shall be allowed for "[a]ny amount paid out for new buildings or for permanent improvements or betterments made to increase the value of any property or estate." 26 U.S.C. § 263. In practice, there is a decided tilt to capitalizing many items because deductions are, as the Supreme Court put it in

INDOPCO, Inc. v. *Commissioner*, 503 U.S. 79, 84 (1992), "strictly construed." That rule of interpretation, of course, has no bearing on whether a particular expenditure by a concessioner should be treated as an addition to its LSI. Besides, we do not understand what the concessioners see as the problem here. The regulation of the Park Service repeats, word for word, the statute's definition of "capital improvement." *Compare* 16 U.S.C. § 5954(e) *with* 36 C.F.R. § 51.51. To the extent the concessioners are claiming that it was incumbent upon the Park Service to add a gloss to the statutory definition, a gloss drawn from accounting standards, they are mistaken, as the district court held. *See* 142 F. Supp. 2d at 83. While agencies may have leeway in interpreting the statutes they administer, there is no rule of law compelling them to embellish what Congress has enacted.

The concessioners also complain about § 51.67 of the regulations, 36 C.F.R. § 51.67, and the "Repair and Maintenance Reserve" in the Park Service's "Standard Concession Contract," 65 Fed. Reg. at 26,069. Section 51.67 provides that concessioners do not earn LSI "for repair and maintenance of real property improvements unless a repair and maintenance project is a major rehabilitation." "Major rehabilitation" is defined in 36 C.F.R. § 51.51 as a pre-approved "comprehensive rehabilitation" project the "construction cost of which exceeds fifty percent of the pre-rehabilitation value of the structure." (The phrase "repair and maintenance" is not defined, in the regulations or in the 1998 Act.) The Standard Concession Contract requires concessioners to establish a reserve fund for repairs and maintenance projects, which "may include repair or replacement of foundations, building frames, window frames, sheathing, subfloors, drainage, rehabilitation of building systems such as electrical, plumbing, built-in heating and air conditioning, roof replacement and similar projects." 65 Fed. Reg. at 26,069.

The concessioners object that § 51.67 allows LSI only for "projects costing more than 50% of a structure's replacement

costs...." 36 C.F.R. § 51.67. What types of "projects" they do not say. If the project is a "capital improvement" it is added to the LSI no matter what the cost of construction. See 142 F. Supp. 2d at 83. If the project is for repair and maintenance it does not qualify, as even the concessioners agree. The 50% regulation — § 51.67 — deals with the question whether an outlay that would otherwise be considered an expenditure for repair and maintenance should constitute a capital improvement because, for instance, the repairs are so extensive. How a particular project should be classified will depend greatly on the particular facts, as it does even in tax cases. *See INDOPCO, Inc.*, 503 U.S. at 86. Nonetheless, the parties quarrel about hypothetical projects. The Park Service says that if a concessioner replaced a damaged dry wall or a rotted beam in a building these would not qualify as capital improvements and thus would not be included in the concessioner's LSI. Brief for Appellees at 36; 65 Fed. Reg. at 20,656. The concessioners argue that the cost of replacing a hotel's brick fireplace would be included. 142 F. Supp. 2d at 83. Replacement of a foundation, according to the concessioners, also would clearly be a capital improvement; according to the Park Service it would not qualify because a foundation is "merely a component of a structure," rather than a "structure, fixture or nonremoveable equipment." *Compare* Brief for Appellants at 44 *with* Brief for Appellees at 39. This last dispute arises because the repair and maintenance reserve clause in the standard contract mentions foundations. But all the clause says is that repair and maintenance "may" include repair or replacement of foundations. 65 Fed. Reg. at 26,069.

The district court, after considering these arguments and others, thought it could not give a definitive answer to the issues thus posed. Echoing *Reno* v. *Flores*, 507 U.S. at 301, and *NCIR*, 502 U.S. at 188, without citing the cases, the court ruled as follows: "the Court cannot say that the regulation, on its face, will be unlawful in its every application. Thus,

this challenge to the regulation must fail." 142 F. Supp. 2d at 85. The court was referring only to the concessioners' attack on the "Repair and Maintenance Reserve" clause but we think its reasoning applies equally to the 50% rule in § 51.67. It is entirely possible that a project calling for repairs to a roof, the replacement of floor boards, the renovation of wiring and plumbing, and so forth would not ordinarily qualify as a "capital improvement." Yet if the total cost of the repair project exceeded 50% of the pre-repair value of the structure it would be added to the LSI. *See* 36 C.F.R. §§ 51.51, 51.67. In that circumstance a concessioner would have no cause for complaint. On the other hand, if the rehabilitation project satisfied the statutory and regulatory definition of a "capital improvement" it would be unlawful for the Park Service to invoke § 51.67 and refuse to treat the expenditure as an addition to the concessioner's LSI. We do not suggest that the Park Service would do anything of the sort. *See* 65 Fed. Reg. at 20,656-57. Our point is that on the face of the regulations, the most we can imagine is that in some applications — depending on how the Park Service administers the LSI regulations — there may be a conflict with the statute. That is not a sufficient basis for holding the regulations unlawful on their face, for the reasons given in part I.B. of this opinion.

B.

The concessioners have two other problems with the LSI regulations. The first relates to 16 U.S.C. § 5954(a)(3) and the valuation of LSI: each concessioner's "leasehold surrender interest is equal to the initial value (construction cost of the capital improvement), increased (or decreased)" by a percentage measured by the Consumer Price Index, less depreciation. The implementing regulation, 36 C.F.R. § 51.51, defines "construction cost" as "the total of the incurred eligible direct and indirect costs necessary for constructing or installing the capital improvement...." "Eligible direct and indirect costs" are costs "in amounts no higher than those prevailing in the locality of the project," *id.* It is this "local-

ity" limitation to which the concessioners object. Projects in national parks, they tell us, are almost always more expensive to construct than "similar private projects in nearby localities, and Congress could not reasonably have intended that concessioners swallow such costs without LSI credit," a point the Park Service does not dispute. Brief for Appellants at 47-48. But as the Park Service points out, the concessioners' argument assumes that "locality" means outside the national park. The regulations do not so state and we see no basis for indulging in that assumption. It may be that the Park Service's particular interpretation regarding a particular project in a particular national park could unreasonably limit the valuation of a concessioner's LSI. But that is no reason to hold that the regulation conflicts with the statute or that it is arbitrary. If a concessioner has its own construction company, as some apparently do, nothing in the 1998 Act requires the Park Service to accept whatever amount the concessioner decides to charge itself for the construction work. *See* 65 Fed. Reg. at 20,651. Like the district court, we therefore sustain the regulation.

The concessioners' remaining problem with the LSI regulations deals with 16 U.S.C. § 5954(a)(5): if the concessioner "makes a capital improvement to an existing capital improvement in which the concessioner has a leasehold surrender interest, the cost of such additional capital improvement shall be added to the then current value of the concessioner's leasehold surrender interest." Their claim is that § 51.65 of the regulations conflicts with this provision. The regulation states:

> A concessioner that replaces an existing fixture in which the concessioner has a leasehold surrender interest with a new fixture will increase its leasehold surrender interest by the amount of the construction cost of the replacement fixture less the construction cost of the replaced fixture.

36 C.F.R. § 51.65. This regulation is unlawful, according to the concessioners, because there is nothing in the statute allowing subtractions from a concessioner's LSI. They also believe the calculations required by the regulation would be an administrative nuisance. In the Grand Canyon concession, for instance, there are about 300 structures with many thousands of fixtures.

The district court sustained the regulation for reasons given by the Park Service, reasons we also find persuasive. Without the regulation, concessioners would receive a windfall every time they removed a fixture and replaced it with a new one:

> If a [concessioner] with a leasehold surrender interest in the hotel were to replace the hotel furnace once every five years for 15 years, the plaintiffs' proposed accounting would be to increase the leasehold surrender interest three separate times by the cost of the furnace. Under this approach, the [concessioner] would hold a leasehold surrender interest equal to four furnaces, even though the hotel would only contain one.

142 F. Supp. 2d at 88 n.16. As to the concessioners' textual argument, it is true that the statute speaks only of additions not subtractions. But under the regulation the calculation is of net additions to LSI — the difference between the cost of the new fixture and the discarded one. When concessioners replace fixtures for a greater cost, their LSI will increase. The regulation deals with how much the increase should be. The statute, which speaks in terms of additions not replacements, does not address that subject. We therefore reject the concessioners' argument that § 51.65 of the regulations is inconsistent with 16 U.S.C. § 5954(a)(5). We reject as well their argument that the regulation is unreasonable. The Park Service's policy of avoiding the windfalls that would result without the regulation is reason enough to

sustain § 51.65, despite the administrative burdens it may generate.

III.

The concessioners claim the Park Service wrongly excluded concessions contracts from coverage under the Contract Disputes Act, 41 U.S.C. § 601 *et seq.* *See* 36 C.F.R. § 51.3; 65 Fed. Reg. at 20,635.

Enacted in 1978, the Contract Disputes Act provides an alternative forum for government contract disputes. Rather than seeking judicial relief in the Court of Federal Claims, a contractor may appeal decisions by a contracting official to an administrative board within that agency. 41 U.S.C. § 607. The board's decision may be appealed to the U.S. Court of Appeals for the Federal Circuit. 41 U.S.C. § 607(g).

Section 51.3 of the regulations states that concession contracts are not "contracts" within the meaning of the Contract Disputes Act. 36 C.F.R. § 51.3 (2000). With this we agree. The Act applies to any "express or implied contract" for the "procurement" of "property," "services" or "construction." 41 U.S.C. § 602(a)(2). A procurement contract, the Park Service reasoned, "is a contract for which the government bargains for, and pays for, and receives goods and services." 65 Fed. Reg. at 20,635. Concession contracts are not of that sort. Their function is not to procure services or goods for the government. Instead, as the Park Service put it, concession contracts "authorize third parties to provide services to park area visitors." *Id.* While the Park Service does not administer the Contract Disputes Act, and thus may not have interpretative authority over its provisions, its reasoning finds support not only in the terms of that statute but also in the National Parks Omnibus Management Act of 1998, under which the Park Service may enter into concession contracts "to authorize a person, corporation or other entity to provide accommodations, facilities and services to visitors to" national parks. 16 U.S.C. § 5952. The Committee reports ac-

companying the 1998 Act also concluded that concession "contracts do not constitute contracts for the procurement of goods and services for the benefit of the government or otherwise," S. REP. NO. 105-202, at 39 (1998); H.R. REP. NO. 105-767, at 43 (1998), a position the Park Service had reached earlier with respect to concession contracts under the 1965 Act. *See, e.g.*, Concessions Contracts and Permits, 57 Fed. Reg. 40,496, at 40,498 (Sept. 3, 1992) (reiterating that the Park Service "has never considered [concessions contracts] a type of federal procurement contract"). The Court of Federal Claims, considering the nature of concession contracts, also concluded that "this arrangement does not constitute a procurement, but is a grant of a permit to operate a business." *YRT Servs. Corp.* v. *United States*, 28 Fed. Cl. 366, 392 n.23 (1993). The decision rested, in part, on the fact that "the government is not committing to pay out government funds or incur any monetary liability." *Id.*

As against this analysis, the concessioners cite several decisions of the Interior Department Board of Contract Appeals [IBCA], a body created by Interior Department regulations, *see* 41 U.S.C. § 607(a); 43 C.F.R. § 4.100 *et seq.* (2000). The IBCA has held that the Contract Disputes Act applies to concession contracts. *See, e.g., Appeal of Watch Hill Concession, Inc.*, IBCA No. 4284-2000, 2001 WL 170911 (2001); *Appeal of Nat'l Park Concessions, Inc.*, IBCA No. 2995, 1994 WL 462401 (1994). But the decisions of this body "on any question of law shall not be final or conclusive." 41 U.S.C. § 609(b). And the IBCA's rationale for determining that concession contracts are procurement contracts is flawed. In its first opinion to consider the issue, the IBCA acknowledged that the Contract Disputes Act does not cover all contracts but then assumed that the Act *does* apply unless coverage is explicitly foreclosed. *See Appeal of R & R Enters.*, IBCA No. 2417, 1989 WL 27790, at 24-25 (Mar. 24, 1989). Nothing in the Act suggests such a sweeping presumption. Another IBCA opinion states that if any

"benefit" can be traced to the government, then the Contract Disputes Act must apply. *Appeal of Nat'l Park Concessions, Inc.*, IBCA No. 2995, 1994 WL 462401, at 14 (Aug. 18, 1994). The primary purpose of concessions contracts is to permit visitors to enjoy national parks in a manner consistent with preservation of the parks. 16 U.S.C. § 5951. That the government receives monetary compensation or incidental benefits from the concessioners' performance is not enough to sweep these contracts into the ambit of the Contract Disputes Act.

IV.

The concessioners' last complaint deals with the portion of the new regulations designed to deal with transactions involving corporate concessioners (*see* 65 Fed. Reg. at 20,661). One of the regulations states:

> The concessioner may not assign, sell, convey, grant, contract for, or otherwise transfer (such transactions collectively referred to as "assignments" for purposes of this part), without the prior written approval of the Director, any of the following:
>
> (a) Any concession contract;
>
> ...
>
> (c) Any controlling interest in a concessioner or concession contract;
>
> ...

36 C.F.R. § 51.85(a) & (c). A similar regulation prohibits, without prior approval, any "encumbrance" of a "controlling interest in a concessioner." 36 C.F.R. § 51.86(c). In the concessioners' view, the regulations extend beyond the statute. The 1998 Act forbids any "concessions contract" from being "transferred, assigned, sold, or otherwise conveyed or pledged by a concessioner" without government approval. 16 U.S.C. § 5957(a). Approval must be given unless "the

entity seeking to acquire a concessions contract is not qualified" or the transfer or conveyance would otherwise adversely affect performance of the contract in a manner specified in 16 U.S.C. § 5957(b). The crucial difference between the regulations and the statute, the concessioners say, is that the regulations require approval of transactions dealing not only with the transfers or assignments of concession contracts but also with changes in control of the concessioner. The Park Service responds that its change-of-control rule ensures that unqualified persons do not wind up holding concession contracts. Unlike individuals, a corporation can in effect transfer a concession contract by selling its stock to another entity. 65 Fed. Reg. at 20,661. As the Park Service sees it, the regulations are a permissible construction of the statutory phrase "otherwise conveyed or pledged," an argument with which the district court agreed. 142 F. Supp. 2d at 90-91.

How the Park Service regulations will operate does not exactly leap from the pages of the Federal Register. It is easy enough to see that if X corporation wanted to sell all its assets, including its concession contract, it would first have to get approval of the Director of the Park Service. No one doubts that the regulation properly requires as much. The Park Service also believes that if the non-public X corporation structured the transaction as a sale of 100% of its stock instead of an asset sale, there would be no functional difference as far as the concession contract is concerned. *See Alarm Indus. Communications Comm.* v. *FCC*, 131 F.3d 1066, 1070-71 (D.C. Cir.1997). It is only a short leap to the conclusion that if, rather than a sale of 100% of the stock, X corporation sold some lesser amount representing a controlling interest, this too should require prior approval. The regulations define controlling interest in much the same manner as the Securities and Exchange Commission, *see, e.g.*, 17 C.F.R. § 210.1-02(g), that is, not in terms of any particular percentage of outstanding voting stock. Rather, a "controlling

interest" in a corporate concessioner constitutes "sufficient outstanding voting securities" of "the concessioner or related entities that permits the exercise of managerial authority" over the concessioner. 36 C.F.R. § 51.84.

Beyond these simple examples we enter a vale of ambiguity. Transactions of the sort just described are not the focus of the concessioners' concern. Their problem is that the regulations--as they read them — require Park Service approval of transactions undertaken by the concessioners' "shareholders or their affiliates." Brief for Appellants at 55. But do they? The shareholders of incorporated concessioners are typically not individuals but parent corporations. The Park Service reports that "many" of its concessioners "are corporations that hold a concession contract as their exclusive business activity" and that almost all of the largest concessioners are "wholly owned subsidiaries of larger corporations." 65 Fed. Reg. at 20,661. One of the plaintiffs here, ARAMARK Sports and Entertainment Services, Inc., is a wholly-owned subsidiary of ARAMARK/HMS Company, which is a wholly-owned subsidiary of ARAMARK Sports and Entertainment Group, Inc., which is a wholly-owned subsidiary of ARAMARK Corporation, which is listed on the New York Stock Exchange. Brief for Appellants at iv.

Wholly-owned means, in the case of incorporated subsidiaries, that the parent corporation holds all of the subsidiary corporation's stock. What worries the concessioners is that transactions by the parent could potentially require Park Service approval if a change in control would result. But the regulations do not read that way. The critical provision is 36 C.F.R. § 51.8. It speaks only of sales, assignments, conveyances and so forth by the "concessioner." The term "concessioner," in regulatory parlance, "is an individual, corporation, or other legally recognized entity that duly holds a concession contract," 36 C.F.R. § 51.3 — a definition that at least on its face encompasses only the subsidiary corporation, not the parent. It therefore appears that if the parent corporation

engages in a sale-of-control transaction, this would not require approval because the concessioner — the subsidiary corporation — would not be doing the selling. The attorneys for the Park Service say, in their brief, that the regulations do indeed cover transactions by the corporate concessioner's parent company. Brief for Appellees at 53-54. But they do not parse the language of the regulations, and they point to nothing in the Park Service's explanation of its regulations that goes so far. In fact, the Park Service justified its regulations on the basis that it would be "anomalous" if a "corporate concessioner" could sell "its stock to a new party (sale of a controlling interest)" without having to seek Park Service approval. 65 Fed. Reg. at 20,661. If, despite the language of the regulations, transactions at the parent level are also supposed to be covered, we are far from certain how the Park Service intends to implement its rules. An investor might begin purchasing stock of the parent corporation of a corporate-concessioner on the open market. Must the concessioner corporation go to the Park Service and ask for approval of the outsider's purchases of the parent when the outsider's percentage of the outstanding shares reaches some magic number? That makes no sense. Neither the concessioner corporation nor the parent corporation has any control over the purchaser. Perhaps this is why the regulation seems to speak only in terms of the concessioner selling its stock. If the regulations do not cover the transaction just mentioned, but do cover a sale of control by a parent corporation, the Park Service would have to justify a rule that allows an outsider, a complete stranger, to gain a "controlling interest" through open market purchases but requires approval before the parent makes a block safe to the same person. Control of the parent, and thus of the subsidiary concessioner, would transfer in both situations, and under the Park Service's theory, so would the concession contract, yet the one transaction would be regulated and the other not.

The short of the matter is that we do not know whether the problems the concessioners identify exist. We cannot be sure that the Park Service will apply its sale-of-control regulations to transactions involving only sales of stock *by* corporate concessioners (as distinguished from open market sales by shareholders or sales by a parent company of its stock). The questions thus raised, and the other questions posed by the many possible forms of corporate restructuring (*see, e.g.*, 1 MARTIN D. GINSBURG & JACK S. LEVIN, MERGERS, ACQUISITIONS, AND BUYOUTS 105 (2001)), present "too many imponderables" to permit judicial review at this time. *Clean Air Implementation Project* v. *EPA*, 150 F.3d at 1200. This aspect of the case, in other words, is not ripe. *See Media Access Project* v. *FCC*, 883 F.2d 1063, 1070 (D.C.Cir.1989). The "classic institutional reason" for postponing review is the "need to wait for a 'rule to be applied [to see] what its effect will be,'" *Louisiana Envtl. Action Network* v. *Browner*, 87 F.3d 1379, 1385 (D.C.Cir.1996) (quoting *Diamond Shamrock Corp.* v. *Costle*, 580 F.2d 670, 674 (D.C.Cir.1978)). The issues here can be presented in a more "concrete" setting. *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 148 (1967); *Ass'n of Am. R.R.*, 146 F.3d 942, 946 (D.C.Cir.1998). The regulations state that "[a]ssignments" without the prior approval of the Park Service will be considered "null and void" and will be viewed as a "material breach of the applicable concession contract which may result in termination of the contract for cause." 36 C.F.R. § 51.88. Whether this means the Park Service will deem transfers of controlling interests in a concessioner's parent as "null and void" is not at all clear. But the prospect certainly can give rise to an interested party's seeking the Park Service's judgment that its proposed transaction does not need approval. A lawsuit could be brought if the concessioner is dissatisfied with the answer. Then at least the court would have some idea of what the Park Service thinks its regulations cover. Then too the validity of the regulations, as thus interpreted, could be deter-

mined in light of the language of the statute, which speaks only of transfers of concession contracts.

The possible hardship to the concessioners in waiting does not alter our conclusion that the issues are not ripe. No concessioner has indicated that a transfer of control is imminent. We therefore have no reason to believe that in the immediate future they will have to alter their conduct to their disadvantage. *Contrast Abbott Labs.*, 387 U.S. at 152. It may be that matters cannot be sorted out without further litigation but that is not the sort of hardship we recognize in evaluating whether a case is ripe for review. *See, e.g., Clean Air Implementation Project*, 150 F.3d at 1206.

Our conclusion that this aspect of the case is not ripe differs from that of the district court, which ruled against the concessioners' claim on its merits. We therefore vacate the district court's judgment in this respect.

* * *

The judgment of the district court is affirmed in part, reversed in part and vacated in part. The case is remanded for further proceedings, consistent with this opinion, on Amfac's as-applied challenge to regulations concerning the preferential right of renewal.

So ordered.

APPENDIX B

United States District Court,
District of Columbia.

AMFAC Resorts, L.L.C., *Plaintiff*,

v.

UNITED STATES Department OF THE INTERIOR, ET AL., *Defendants*.

NATIONAL PARK Hospitality ASSN., *Plaintiff*,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL., *Defendants*.

HAMILTON Stores, INC., *Plaintiff*,

v.

UNITED STATES Department OF THE INTERIOR, ET AL., *Defendants*.

ARAMARK SPORTS AND Entertainment SERVICES, INC., *Plaintiff*,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL., *Defendants*.

CIV.A. 00-2838, 00-2885, 00-2937, 00-3085.

May 23, 2001.

MEMORANDUM OPINION

LAMBERTH, District Judge.

Now before the Court is a group of cases that implicate a variety of issues, all of which are covered in the defendants' motion to dismiss, and the parties' cross motions for partial

summary judgment. At its heart, the dispute centers on the National Park Service's ("NPS") treatment of current and potential concessioners at various national parks. The plaintiffs — three of which are concessioners and one of which is an association of concessioners — all allege that various NPS regulations are contrary to Congressional pronouncements on national park concession management.

On April 24, 2001, the Court ruled that the plaintiffs were not entitled to discovery beyond the administrative record, and that certain confidential information could be shared with experts, provided various conditions were observed. The Court also ruled that day that Delaware North, Inc., a concessioner, was entitled to intervene in this matter on behalf of the defendants. Delaware North is a competitor of the plaintiffs, and seeks to become a concessioner in certain parks where the plaintiffs currently hold concession contracts.

To summarize the Court's holding, the Court first holds that the plaintiffs' Rule 56(f) motion to stay summary judgment proceedings and take discovery must be DENIED.[1] The Court next holds that the defendants' motion to dismiss must be DENIED with respect to the preferential right to renewal issue, but GRANTED with respect two other issues.[2] Finally, the Court holds that the disputed regulations are permissible in all respects save one. The defendants' regulations are generally concise, well explained, and responsive to the many comments received from interested parties. The defendants only run afoul of the law in their requirement that concessioners bid on prospectuses or else lose their preferential right of renewal. An order consistent with this Opinion shall issue separately this date.

[1] This issue was substantially addressed in the Court's April 24, 2001 Opinion. In that Opinion, the Court determined that the plaintiffs were not entitled to extra-record discovery. *See* Memorandum and Order, Apr. 24, 2001, at 11-13.

Federal Rule of Civil Procedure 56(f) "allows a summary judgment motion to be denied; or the hearing on the motion to be continued, if the nonmoving party has not had an opportunity to make full discovery." *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 326 (1986). As the plaintiffs are not entitled to any discovery, a stay of proceedings would not increase the plaintiffs' "opportunity to make full discovery." Thus, the plaintiffs' Rule 56(f) motion must be denied.

As a preliminary matter, the Court notes its jurisdiction under 28 U.S.C § 1331. The plaintiffs' well-pleaded complaints present an issue of federal law, and all parties concede as much. *See* Brief for Plaintiffs, Feb. 28, 2001, at 14-15; Brief for Defendants, Apr. 9, 2001, at 21. The law applicable to the resolution of this case is federal law, whether in constitutional, statutory, or common law form. *See United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 726-27 (1979) (quoting *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 366 (1943)) ("[A]gencies derive their authority to effectuate ... transactions from specific Acts of Congress passed in the exercise of 'constitutional function or power', [and thus] their rights, as well, should derive from a federal source.").

I. THE DEFENDANTS' MOTION TO DISMISS

A. Background

The plaintiffs have been concessioners in various national parks for the past 30 years.[3] Their concession contracts are

[2] These two issues are the plaintiffs' claims regarding the timing of compensation for a concessioner's leasehold surrender interest, *see* Part.II.N, and Hamilton Stores' claim regarding the minimum franchise fee for the Yellowstone Park concession contract. *See* Part I.B.3.b.

[3] The Court notes that one of the plaintiffs, the National Park Hospitality Association ("NPHA"), is not actually a concessioner. Rather, it is an association of concessioners. Nonetheless, as the

set to expire on December 31, 2001, and they are currently interested in continuing as concessioners. To achieve this goal, the plaintiffs must participate in a contracting process dictated by the NPS. In the spring of 2000, the NPS modified this process in light of recent legislation.[4]

The new contracting process is chiefly controlled by an NPS regulation entitled "*Concession Contracts*." 65 Fed. Reg. 20630 (Apr. 17, 2000); see also 36 C.F.R. 51. This regulation, states the NPS, has "three major purposes": (1) to enhance the competitiveness of contract bidding by diminishing various concessioners' "preference in renewal", (2) to convert the valuation of concessioners' capital improvements from a "possessory interest" valuation to a "leasehold surrender interest" valuation, and (3) to explain various smaller provisions that "concession contracts will contain in the implementation of the 1998 Act." 65 Fed Reg. 20630-31 (Apr. 17, 2000); 36 C.F.R. 51. This regulation is supplemented by a second regulation, entitled "Standard Concession Contract", which incorporates the changed terms into a new contract. *See* 65 Fed. Reg. 26052. It is these two regulations, as well as any "prospectuses"[5] issued pursuant thereto, that the plaintiffs challenge in multiple respects.

NPHA comes before the Court on behalf of its members, and for ease of reference, the Court refers to the NPHA as a "concessioner."

[4] On November 13, 1998, Congress significantly altered concession management policies by enacting the National Parks Omnibus Management Act of 1998. 16 U.S.C. §§ 5951-5966. As the motion to dismiss concerns only standing and ripeness issues, it is not necessary to discuss the details of the Act at this point.

[5] In this context, a "prospectus" is in invitation to bid on a contract. It contains various information necessary to formulate a bid, including a copy of the specific contract up for bidding.

The defendants move to dismiss two of the plaintiffs' many claims. Specifically, the defendants claim that the law of standing and ripeness prevent the plaintiffs from pursuing (1) their joint claim for a preferential right of renewal, and (2) Hamilton Stores' claim of unreasonable franchise fee.[6] These two claims will now be shortly described.

1. The Plaintiffs' Joint Claim of a Contractual Right to Preferential Renewal

All four plaintiffs claim that their concession contracts give them a preferential right of renewal. This right would give each plaintiff the right to match the best bid made on a prospectus, and thereby obtain the concession contract. The defendants deny that this right even exists, but also argue that, even if it does, this claim must be dismissed because it "essentially concerns what might happen to [the plaintiffs] upon the expiration of [their] Contracts." Brief for Defendants, Jan. 19, 2001, at 1-2. That is, as the disputed concession contracts have yet to be awarded, the plaintiffs have yet to be denied any contract. It is quite possible, argue the defendants, that the plaintiffs may obtain the sought after concession contracts, and thus suffer no harm from the loss of their preferential right of renewal.

2. Hamilton Stores' Claim on the Yellowstone Park Prospectus' Franchise Fee Requirement

By statutory mandate, the NPS is to set a minimum franchise fee based "upon consideration of the probable value to the concessioner of the privileges granted by the particular contract involved." 16 U.S.C. §§ 5952(4), 5956(a). The probable value of a contract's privileges, in turn, "shall be based on a reasonable opportunity for net profit in relation to

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[6] The defendants also move for dismissal on various jurisdictional grounds, but concede that the Court, at the least, has federal question jurisdiction. *See* Brief for Defendants, Apr. 9, 2001, at 21.

the capital invested and the obligations of the contract." 16 U.S.C. § 5956(a). Thus, by statute, the NPS is required to determine the capital investment that a new concessioner will likely make if awarded the contract.

Generally speaking, when a new concessioner obtains a concession contract, that concessioner is required to purchase the exiting concessioner's inventory, equipment, and real property interests. AR, 17-18. These purchases, among others, make up the new concessioner's "capital investment." The greater a concessioner's capital investment will be, the lower the NPS sets the minimum franchise fee in the prospectus. Thus, an undervaluing of an exiting concessioner's inventory, equipment and real property interests will result in an overestimate of the minimum franchise fee required of new concessioners. This overestimate, in turn, might be unlawful if it were to deny a concessioner a "reasonable opportunity for net profit." 16 U.S.C. § 5956(a).

Hamilton Stores alleges that its inventory, equipment, and real property interests have been significantly undervalued and that the resulting minimum franchise fee for the Yellowstone contract is too high.[7] This, Hamilton argues, "flatly violates the statutory rule requiring NPS to offer concession contracts that would provide the concessioner with 'a reasonable opportunity for net profit in relation to capital invested.'" Brief for Hamilton Stores, Feb. 28, 2001, at 1.

It is important to recognize that, although Hamilton is alleging a miscalculation of its *current* possessory interests,

[7] The NPS hired Dornbusch & Company to value Hamilton Stores' inventory, equipment, and real property interests. *See* AR, 1748-62 (memorandums by Dornbusch & Co. explaining the valuations of Hamilton Stores' assets, and the appropriate franchise fee in light thereof).

its claim is from the perspective of a *future* concessioner. That is, the harm for which Hamilton is seeking redress is its *future* disbursement of excessive franchise fees, *not* the insufficient compensation paid to it as an exiting concessioner.[8]

The Court now considers the defendants' arguments to determine whether the plaintiffs are properly before this Court.

B. Analysis

1. Standard of Review

If a plaintiff has failed "to state a claim upon which relief can be granted," a court may grant a defendant's motion to dismiss. Fed. R. Civ. P. 12(b)(6); *see also Hishon* v. *King & Spalding*, 467 U.S. 69, 73 (1984); *Sparrow* v. *United Air Lines, Inc.*, 216 F.3d 1111, 1114 (D.C.Cir.2000). In evaluating a motion to dismiss, a court must construe the complaint

[8] Hamilton Stores' compensation for its inventory, equipment, and real property interests is calculated under the terms of its concession contract, not under any statute or regulation. For example, section 12 of the Hamilton Stores' contract provides extensive directions on the determination of Hamilton's possessory interests. See Hamilton Stores Concession Contract, AR 212-13 (providing that the "fair value of a possessory interest shall be the sound value of the improvement to which it relates at the time of transfer of such possessory interest, without regard to the term of the contract. The sound value of any structure, fixture, or improvement shall be determined upon the basis of reconstruction cost less depreciation evidenced by its condition and prospective serviceability in comparison with a new unit of like kind, but not to exceed fair market value").

Thus, if Hamilton were alleging underpayment of its possessory interests, its claim would lie in contract law, not the arbitrary and capricious standard of the APA and the Tucker Act.

* * * * * *

in the light most favorable to the plaintiff and give the plaintiff "the benefit of all inferences that can be derived from the facts alleged." *Schuler* v. *United States*, 617 F.2d 605, 608 (D.C.Cir.1979); *see also Scheuer* v. *Rhodes*, 416 U.S. 232, 236 (1974). "However, legal conclusions, deductions or opinions couched as factual allegations are not given a presumption of truthfulness." *Wiggins* v. *Hitchens*, 853 F. Supp. 505, 508 n.1 (D.D.C.1994) (citing 2A Moore's Federal Practice, § 12.07, at 63 (2d ed.1986) (footnote omitted); *Haynesworth* v. *Miller*, 820 F.2d 1245, 1254 (D.C.Cir.1987)).

2. The Law of Standing and Ripeness

The doctrines of standing and ripeness are "designed to test the fitness of controversies for judicial resolution." *Louisiana Envtl. Action Network* v. *Browner*, 87 F.3d 1379, 1382 (D.C.Cir.1996). They both contain a "blend of constitutional requirements and prudential considerations." *Valley Forge Christian College* v. *Americans United for Separation of Church & State*, 454 U.S. 464-471 (1982); *CC Distributors* v. *United States*, 883 F.2d 146, 149 (D.C.Cir.1989).

(a) Standing

To have constitutional standing, a plaintiff must show that (1) it has "suffered an injury in fact" that is (2) "fairly ... traceable to the challenged action of the defendant" and which (3) will be "redressed by a favorable decision." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citations and internal quotations omitted); *see also Allen* v. *Wright*, 468 U.S. 737, 756 (1984); *Warth* v. *Seldin*, 422 U.S. 490, 508 (1975).

A plaintiff's alleged injury qualifies as a constitutional "injury in fact" if the plaintiff suffers an "invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 *Whitmore* v. *Arkansas*, 495 U.S. 149, 155 (1990); *Los Angeles* v. *Lyons*, 461 U.S.

95, 102 (1983); *Sierra Club* v. *Morton*, 405 U.S. 727, 740-741, n.16 (1972). Of importance in the case sub judice, this Circuit has repeatedly recognized as an injury the "loss of ... opportunity to compete for a contract." *CC Distributors*, 883 F.2d at 150; *see also Lepelletier* v. *FDIC*, 164 F.3d 37, 42 (D.C.Cir.1999); *DIREC TV, Inc.* v. *FCC*, 110 F.3d 816, 829 (D.C.Cir.1997).

In *CC Distributors* v. *United States*, this Circuit considered a government contractor's challenge to an Air Force policy which diminished the contractor's opportunity to secure contracts. The government argued that, since the contractor had not yet been denied a contract, it had not yet sustained a constitutional injury. *C.C. Distributors*, 883 F.2d at 149-50. The Court disagreed, and held that "a plaintiff suffers a constitutionally cognizable injury by the loss of an opportunity to pursue a benefit ... even though the plaintiff may not be able to show that it was certain to receive the benefit had it been accorded the lost opportunity." *Id.* at 150. In support of this, the Court noted a broad variety of caselaw that supports the general proposition that the "denial of an opportunity" is a cognizable injury. *Id.* at 150 (citing *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 264 (1977); *Regents of the Univ. of Cal.* v. *Bakke*, 438 U.S. 265 (1978); *West Virginia Ass'n of Comm. Health Centers* v. *Heckler*, 734 F.2d 1570 (D.C.Cir.1984); *National Ass'n of Neighborhood Health Centers, Inc.* v. *Mathews*, 551 F.2d 321 (D.C.Cir.1976)).

Apart from its constitutional dimensions, standing also has a prudential aspect. This aspect requires that a court determine whether the plaintiff's interests are "arguably within the zone of interests to be protected or regulated by the statute ... in question." *Association of Data Processing Serv. Organizations, Inc.* v. *Camp*, 397 U.S. 150, 153 (1970). In other words, a court should ask "whether, in view of Congress' evident intent to make agency action presumptively reviewable ... Congress intended for [a particular] class [of

plaintiffs] to be relied upon to challenge agency disregard of the law." *Clarke* v. *Securities Industry Ass'n*, 479 U.S. 388, 399-400 (1987); *see also CC Distributors*, 883 F.2d at 151.

(b) Ripeness

Although the ripeness doctrine is often understood to overlap with the standing doctrine, *see Wyoming Outdoor Council* v. *United States Forest Serv.*, 165 F.3d 43, 48 (D.C.Cir.1999), it retains a separate analytical framework. The framework reveals the doctrine's dual pedigree — pedigree that is partially traceable to Article III, but mostly traceable to the court's prudential goals of avoiding "abstract disagreements" and "premature adjudication." *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 148-49 (1967); see also 13A Charles A. Wright, Arthur R. Miller and Edward H. Cooper, FEDERAL PRACTICE AND PROCEDURE, § 3532.1, at 118-19 (2d ed.1984) (recognizing the dual underpinnings of the single analytical framework).

In considering a claim's ripeness, a court is to evaluate "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Ohio Forestry Ass'n* v. *Sierra Club*, 523 U.S. 726, 733 (1988); *Abbott Laboratories*, 387 U.S. at 149. A claim's fitness for judicial resolution hinges on "whether the issue is purely legal, whether consideration of the issue would benefit from a more concrete setting, and whether the agency's action is sufficiently final." *George E. Warren Corp.* v. *EPA*, 159 F.3d 616, 621 (1998). From a more pragmatic perspective, courts often defer judgment if intervening circumstances are likely to make "[judicial] resolution of the dispute ... unnecessary." *Edison Elec. Institute* v. *U.S. E.P.A.*, 996 F.2d 326, (D.C.Cir.1993); *State Farm Mut. Auto. Ins. Co.* v. *Dole*, 802 F.2d 474, 479 (D.C.Cir.1986). With regard to the hardship caused by delayed review, courts generally consider hardship to be a "secondary concern" and only evaluate it if there are "doubts about the fitness [prong]." *Consolidated Rail Corp.*

v. *United States*, 896 F.2d 574, 577 (D.C.Cir.1990); *American Petroleum Inst.* v. *U.S. EPA*, 906 F.2d 729, 739 n.13 (1990). In cases where the fitness prong is satisfied, "lack of hardship cannot tip the balance against judicial review." *Id.*; *Askins* v. *District of Columbia*, 877 F.2d 94, 98 (D.C.Cir.1989); *Consolidation Coal Co.* v. *Federal Mine Safety & Health Review Comm'n*, 824 F.2d 1071, 1081-82 (D.C.Cir.1987).

3. The Defendants' Motion to Dismiss

Viewing these two claims against the law of standing and ripeness, the Court finds that preferential right claim may proceed, but that the franchise fee claim must be dismissed.

(a) The Right to Preferential Renewal

At the outset, it is clear that the plaintiffs' claim of a contractual right to preferential renewal falls squarely within the rule that a loss of opportunity to compete is an injury in fact. The plaintiffs allege that they have a legal right, vested in them through contract, to renew their contract if they can match the next best bid. By preventing them from participating in the bidding process in this fashion, the defendants undeniably infringe upon interests which the plaintiffs claim are "legally protected." *Lujan*, 504 U.S. at 560. An injury in fact thus exists.

From a prudential standpoint, the Court finds little reason to depart from its finding of constitutional standing. As national park concessioners, the plaintiffs are almost per se within the "zone of interests to be protected" by the enactment of a statute titled the "National Parks Omnibus Management Act of 1998." *Association of Data Processing Serv. Orgs.*, 397 U.S. at 153. The plaintiffs are all central players in the concession system which Congress attempted to reform.

With regard to ripeness, the Court finds it appropriate to retain jurisdiction at this time. First, the preferential right of

renewal issue is largely legal; it hinges on statutory and regulatory interpretation, and does not implicate a complicated array of facts. Second, the issue would not "benefit from a more concrete setting," as a fully executed contract would present the Court with substantially the same issues currently under dispute. *Warren Corp.*, 159 F.3d at 621. Moreover, the NPS's policy on this issue is clearly "crystallized" in its final form. *Eagle-Picher Indus.* v. *U.S. EPA*, 759 F.2d 905, 915 (D.C.Cir.1985). The NPS has reviewed and re-reviewed the issue, and promulgated a lengthy regulation and explanation. Furthermore, the NPS has endorsed this view by issuing prospectuses which are consistent with the details enunciated in the regulations. *See* Brief for Plaintiffs, Feb. 28, 2001, at 19.

With regard to the plaintiffs' hardship should judicial review be delayed, the Court need not find any hardship because it has little doubt that the issues are currently fit for judicial review. *See Consolidated Rail Corp.*, 896 F.2d at 577.

(b) Hamilton Stores' Franchise Fee Claim

The Court finds that Hamilton Stores does not have standing to bring its franchise fee claim, and also that the claim is not currently ripe for review.

First, it is entirely conjectural whether the minimum franchise fee of 3.5 percent will provide Hamilton Stores with a "reasonable opportunity for net profit." 16 U.S.C. § 59[illegible]6(a). Not only is it pure conjecture whether Hamilton will obtain the new concession contract, but even if it did, it is even more conjectural whether the franchise fee, together with the future economic environment, will deny it the opportunity for a profit. Thus, Hamilton Stores does not have standing to bring this claim.

Likewise, Hamilton Stores' franchise fee claim is also not ripe. Whether a 3.5 percent franchise fee will permit Hamilton Stores (who may or may not be the new concessioner) a reasonable opportunity for net profit is *not* a "purely legal" issue; to the contrary, it is an issue highly contingent on facts which are currently unknown and unknowable. *Warren Corp.*, 159 F.3d at 621. Moreover, the resolution of this issue would substantially benefit if it were posed in a "more concrete setting." *Id.* It is wholly beyond the judiciary's means to hypothesize on the economic health of national park concessions at some distant time. The Court is not blind to the fact that a 3.5 percent franchise fee may indeed be violative of section 5956(a). If Hamilton obtains the next Yellowstone concession contract, and thereafter determines there is not a reasonable opportunity for profit at a franchise fee of 3.5 percent, Hamilton may bring a claim at that time. Until then, this Court must decline to review the issue.

Hamilton Stores argues at great length that the minimum franchise fee is flawed because the capital asset valuation used to set the fee was itself flawed. Even if the Court were to accept this argument (which it emphatically declines to do), Hamilton has still failed to show that this flawed analysis causes it a current or imminent injury. The injury which Hamilton Stores alleges-the lost opportunity to earn a profit-is contingent upon several independent factors which may or may not occur. The occurrence (or non-occurrence) of any one of these factors could easily make the "resolution of the dispute ... unnecessary." *Edison Elec. Institute* v. *U.S. E.P.A.*, 996 F.2d at 326; *State Farm Mut. Auto. Ins. Co.*, 802 F.2d at 479. Hamilton Stores' franchise fee claim must thus be dismissed for lack of standing and ripeness.

C. Conclusion

For the foregoing reasons, the Court finds that the plaintiffs may continue with their preferential renewal right claim. However, Hamilton Stores may not continue with its fran-

chise fee claim.[9] The Court therefore turns to the cross motions for summary judgment.

II. THE CROSS MOTIONS FOR SUMMARY JUDGMENT

A. Standard of Review

Federal Rule of Civil Procedure 56(c) provides that a district court shall grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is (1) no genuine issue as to any material fact and that (2) the moving party is entitled to judgment as a matter of law." See Fed. R. Civ. P. 56(c); *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Diamond* v. *Atwood*, 43 F.3d 1538, 1540 (D.C.Cir.1995). To survive a motion for summary judgment, the nonmovant must make a "sufficient showing to establish the existence of an element essential to that party's case." *Celotex*, 477 U.S. at 322. A "sufficient showing" exists when the evidence is such that a reasonable jury could return a verdict for the nonmovant. *Anderson*, 477 U.S. at 248.

B. Applicable Law

This case challenges the regulations and official policy of a federal agency. In considering such matters, Article III courts utilize the rule of deference promulgated in *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837 (1984). *Chevron* requires a court to analyze agency action under a two-step analysis. "First, always, is the question of whether Congress has directly spoken to the issue. If the

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[9] In addition to the franchise fee claim, the Court dismisses one other claim pursuant to Rule 12(b)(1). *See* Part II.N. That issue did not become discrete until the parties briefed it during the summary judgment proceedings, and is most easily understood in that context.

intent of Congress is clear, then that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 841. If, however, the statute is "silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's [final action] is based on a permissible construction of the statute." *Id.* A construction is permissible if it is reasonable. The agency's construction, however, need not be the only or most reasonable interpretation, *see id.* at 843 n.11, it must merely be "rational and consistent with the statute." *NLRB* v. *United Food & Commercial Workers Union*, 484 U.S. 112, 123 (1987). *See also General Elec. Co.* v. *United States Envt'l Protection Agency*, 53 F.3d 1324, 1327 (D.C.Cir.1995).

C. The Contractual Right of Preferential Renewal

1. Background

Almost 85 years ago, the National Park Service was created to oversee our national parks and to "conserve the scenery and the natural and historic objects and the wild life therein and ... provide for the enjoyment of the same." 16 U.S.C. § 1. Throughout this entire period, the NPS has relied on private concessioners for the provision of "lodging, food, merchandising, transportation, outfitting and guiding, and similar activities." 64 Fed. Reg. 20630 (Apr. 17, 2000).

During the 1960s, Congress and the NPS determined that certain incentives were necessary to maintain the continuity of operation in the national parks. With this in mind, Congress enacted the Concessions Policy Act of 1965. Section 20d of that Act stated:

> The Secretary shall encourage the continuity of operation and facilities and services by giving preference in the renewal of contracts or permits and in the negotiations of new contracts of permits to the concessioners who have performed their obligations

under prior contracts or permits to the satisfaction of the Secretary.

16 U.S.C. § 20d.

After this statute was enacted, the plaintiffs in the instant case all entered into long-term concession contracts with the NPS. None of the contracts contained any provision granting the plaintiffs a preference in the renewal of their contracts.

In 1989, the Department of the Interior began a review of National Park concessions, with the goal of finding ways to enhance concession management. Three years later, in 1992, the Department issued a report making various findings and recommendations for improvement. Among the findings was the observation that the right of preference in renewal enjoyed by incumbent concessioners significantly impeded the competition for concession contracts. See 57 Fed. Reg. 40508, 40508 (Sept. 3, 1992).

In 1998, after the NPS tried to address this issue with regulations, Congress enacted the National Parks Omnibus Management Act of 1998 (the "1998 Act"). 16 U.S.C. §§ 5951-5966. Section 5952 of the Act orders that the

Secretary shall not grant a concessioner a preferential right to renew a concessions contract, or any other form of a preference to a concessions contract.[10]

16 U.S.C. § 5952(7)(A). Although the 1998 Act expressly repealed the 1965 Act, Section 415 of the 1998 Act stated that:

[10] Part (7)(B) of Section 5952 does permit the Secretary to grant this right to a small category of concessioners, specifically "outfitter and guide services and small [concession] contracts." The issues surrounding the rights created by this provision are not addressed here, but rather in section E, *infra*.

the repeal of [the 1965 Act] shall not affect the validity of any concessions contract or permit entered into under [the 1965 Act] but the provisions of this [Act] shall apply to any such contract or permit except to the extent such provisions are inconsistent with the terms and conditions of any such contract or permit.

Pub. L. No. 105-391, Title IV, § 415(a), Nov. 13, 1998.

After the passage of the 1998 Act, the NPS reformed certain concession contract regulations to make them, in its opinion, consistent with the new statute. On the issue of whether contracts entered into under the 1965 Act contain a right to a preference in renewal, the NPS stated:

> In circumstances where a 1965 Act concession contract does not make express reference to a preference in renewal, it is the final administrative decision of the NPS ... that their repeal of the 1965 Act's preference in renewal by the 1998 Act is applicable to holders of 1965 Act concession contracts.

65 Fed. Reg. 20630, 20664 (Apr. 17, 2000); *see also* 36 C.F.R. § 51.102 (codifying the presumption against a preferential renewal right in a 1965 Act contract, unless express language indicates otherwise).

It is this agency policy which the plaintiffs urge the Court to hold contrary to law. The Court now undertakes that evaluation.

2. Analysis

The lawfulness of the defendants' regulations turns on whether the plaintiffs each have a contractual right to preferential renewal. If the plaintiffs do have such a right, then the NPS's regulations are unlawful because they unilaterally delete a valid contract term. If the plaintiffs do not have such a

right, then the NPS's regulations are lawful in that they have not diminished any of the plaintiffs' contractual rights and are an otherwise reasonable interpretation of the 1998 Act. In making this determination, the Court's review is necessarily limited to the administrative record. *See Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971).

The Court begins by noting the obvious, which is that no contract between the NPS and the plaintiffs contains an *express* term granting the concessioners a preferential right to renewal. Thus, the plaintiffs can only be found to have this right if one of three circumstances exists: (1) the right derives from statute, (2) the right derives from an implied contract, or (3) the right derives from an implied term in the current concession contracts. The Court finds that none of these situations exist, and therefore that the plaintiffs do not have a right to preferential renewal.

(a) Contract Rights Established by Statute

"The principal function of a legislature is not to make contracts, but to make laws." *National R.R. Passenger Corp.* v. *Atchison Topeka & Santa Fe Ry.*, 470 U.S. 451, 466 (1985). Thus, there exists a strong "presumption ... that a law is not intended to create private contractual or vested rights." *Id.* Of course, a legislature might, if it wishes, bestow upon a party a contractual right. But, given the presumption to the contrary, a legislature, must do so in "unmistakable terms." *Bowen* v. *Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52 (1986) (quoting *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 138 (1982)).

The Court need not review the law on this issue further to conclude that the 1965 Act did not vest in the plaintiffs a contractual right to preferential renewal. Section 20d of the 1965 Act stated:

> The Secretary shall encourage the continuity of operation and facilities and services by giving preference in the renewal of contracts or permits and in the negotiations of new contracts of permits to the concessioners who have performed their obligations under prior contracts or permits to the satisfaction of the Secretary.

16 U.S.C. § 20d. This provision is egregiously short of conveying in "unmistakable terms" a contractual right to the plaintiffs. First, the provision is wholly bereft of even the most standard contractual language. For instance, there is no clause which notes that the renewal preference is "in consideration of" any act of the concessioners.

Second, the terms of the Act actually belie a contractual interpretation. By its terms, the Act orders the Secretary of Interior to "giv[e]" renewal preferences to the concessioners; it does not order the Secretary to contract with the concessioners for the renewal right. This observation is important, as elsewhere in the Act, the Secretary is explicitly authorized to *contract* for a preferential right of renewal in certain limited circumstances. *See* 16 U.S.C. § 20c. This suggests that, had Congress wished to create contractual renewal rights in concessioners like the plaintiffs, it would have provided such discretion to the Secretary. *See National Rifle Ass'n* v. *Reno*, 216 F.3d 122, 130-31 (D.C.Cir.2000) (where Congress includes particular language in one section of a statute, but omits it in another, the omission is presumed to be intentional). Congress's failure to do this forecloses any possibility that the 1965 Act bestowed contractual renewal rights on the plaintiffs.

(b) Implied Contracts

An implied-in-fact contract exists when parties "manifest their agreement ... by conduct" instead of words. John D. Calamari & Joseph M. Perillo, THE LAW OF CONTRACTS, § 1.11, at 21 (4th ed.1998). As the Supreme Court has ex-

plained, the "meeting of minds" in an implied-in-fact contract is inferred from the "conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding." *Hercules, Inc.* v. *United States*, 516 U.S. 417, 424 (1996) (citation omitted).

Common examples include contracts for goods formed by a raised hand at an auction, or contracts for services formed by calling a repairman to your house. *See* RESTATEMENT (SECOND) OF CONTRACTS § 4 cmt. b In each case, the *facts* of the situation make clear that the parties wish to be bound in contract, even without an explicit offer and acceptance.

To demonstrate an implied-in-fact contract, a party must show "(1) mutuality of intent to contract, (2) consideration, (3) unambiguous offer and acceptance, and (4) that the representative whose conduct is relied upon had actual authority to bind the government." See *City of Cincinnati* v. *United States*, 153 F.3d 1375, 1377 (Fed.Cir.1998); *Hoffmann* v. *U.S.*, 53 F. Supp. 2d 483, 488 (D.D.C.1999).

Based on this explanation of law and the administrative records filed in these cases, the Court finds that the plaintiffs do not have a preferential right to renewal derived from an implied contract. The Court finds nothing in the administrative record suggesting that the NPS and the plaintiffs entered into a contract through mere conduct. Nor, for that matter, have the plaintiffs provided a single citation to the record on this issue. Although the plaintiffs repeatedly refer to numerous declarations of individuals who deem the contractual right to exist; none of these declarations are part of the administrative record, and there is no compelling reason for the Court to look beyond the record and consider them. *See Esch* v. *Yeutter*, 876 F.2d 976, 991-92 (D.C.Cir.1989) (summarizing the instances where a court may look beyond the administrative record in evaluating agency action). The Court thus finds that no implied contract for preferential renewal exists.

(c) Implied Terms in Contracts

In the field of contract law, courts generally assume that "every person is ... capable of managing his own affairs." 11 Lord, WILLISTON ON CONTRACTS, § 31.5, at 298 (4th ed.1999). Nonetheless, in a small number of circumstances, courts have been willing to add — or imply — terms into written and fully integrated contracts. As summarized by one federal court:

> Implied covenants are disfavored. Only two circumstances are held to warrant implication of a covenant: (1) the parties thought it so obvious it did not need stating or (2) it is a necessary result of what is stated, either as an implication of the language used or it is indispensable to effectuate the intention of the parties.

In re KDT Industries, Inc., 30 B.R. 252, 254 (S.D.N.Y.1983); see also 11 LORD, WILLISTON ON CONTRACTS, § 31.7, at 317-23 (4th ed.1999) (summarizing case-law on implied contract terms).

Often times, the terms sought to be implied are statutes in existence at the time the contract was formed. In considering this proposition, the U.S. Supreme Court concluded that a state law should be implied as a contract term only if the term is "so central to the bargained-for exchange between the parties, or to the enforceability of the contract as a whole, that it must be deemed to be a term of the contract." *General Motors Corp.* v. *Romein*, 503 U.S. 181, 188-89 (1992) (emphasis added); *see also Sacramento Navigation Co.* v. *Salz*, 273 U.S. 326, 329 (1927) ("A contract includes not only the promises set forth in express words, but in addition all such implied provisions as are indispensable to effectuate the intentions of the parties and arise from the language of the contract and the circumstances under which it was made.").

A short example illustrates the intuitive nature of this doctrine. The case involved a contract between the United States government and a refrigerator contractor. *See City of New York* v. *U.S.*, 125 Ct.Cl. 576, 113 F. Supp. 645 (1953). The government leased a certain quantity of "cooler" space at a rate of $1.00 per square foot, and another quantity of "freezer" space at a rate of $1.50 per square foot. After the parties agreed on a total price of $270,000, the government sought additional "freezer" space in place of its "cooler" space. However, the government refused to pay any extra price, arguing instead that the terms of the lease provided the government with the option of switching between cooler and freezer space, but did not provide for an adjustment in contract price. *Id.* at 646. The court disagreed, and found it patently obvious that a change in refrigerator space would necessitate a change in the total price. The court then supplied the contract with such a clause based on what was undoubtedly "intended at the time of the execution of the [contract]." *Id.* at 647.

In light of the foregoing law, the Court finds that a preferential right of renewal is not an implied term in the plaintiffs' current concession contracts. First, it can hardly be said that the preferential right of renewal was "so obvious[ly] [a part of the contract that] it did not need stating." The preferential renewal term is a significant contract term, one that would clearly be a large component of the bargained-for exchange. It is not a routine term, and it is certainly not the type of term that sophisticated parties such as the NPS and the plaintiffs would consider "so obvious" as to leave unwritten. The administrative record provides no indication that the parties had the mutual understanding that the contract contained the renewal term.

Second, nothing in administrative record suggests that the renewal term is "indispensable to effectuate the intention of the parties." As just stated above, the administrative is wholly devoid of information suggesting that the NPS *in-*

tended the renewal term to be part of the contract. Moreover, the contract is not rendered senseless or ineffectual without the renewal term. To the contrary, the contract has sufficed for the past 30 years, and is such that the plaintiffs seek to re-enter it once again. Thus, the Court finds that the preferential right of renewal is not an implied term in the plaintiffs' concession contracts.

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Thus, finding that the plaintiffs do not have a contractual right of renewal, the Court finds that the NPS's regulations and prospectuses are a reasonable interpretation of applicable law on this issue. The Court now turns to a related issue: whether the NPS's regulations are unlawful with respect to concessioners that have a statutory right of preferential renewal.

D. The Statutory Right of Preferential Renewal

In the preceding section, the Court held that the plaintiffs do not have a contractual right of preferential renewal. This does not end the renewal issue, however. The 1998 Act explicitly grants a preferential renewal right to concessioners with gross receipts of less than $500,000 annually, and to outfitting and guide concessioners. *See* 16 U.S.C. § 5952(7)(B). Although Amfac, Aramark, and Hamilton Stores do not fall within these parameters, many members of the National Park Hospitality Association ("NPHA") do. Thus, because the NPHA has associational standing in this respect, the Court now considers whether the NPS regulations which implement concessioners' statutory right of preferential renewal are contrary to law. The NPHA makes six arguments as to the regulations' unlawfulness.

1. Matching the Terms of the Best Offer

The NPHA complains that NPS regulations require incumbent concessioners wishing to exercise their preferential right of renewal to not just match the best proposal, but to

submit a *better* proposal. More specifically, the NPHA argues that incumbent concessioners are given the opportunity to match the "better terms and conditions of the best proposal," but are not permitted to also adopt the weaker terms of the best proposal. 36 C .F.R. § 51.32. In this respect, the final proposal of the incumbent concessioner would contain better terms and conditions than any other proposal.

The defendants argue that this is not true, and that the incumbent concessioner is indeed "entitled to match the terms and conditions, both more favorable and less favorable than what the incumbent offered, of the best proposal." Brief for Defendants, Apr. 9, 2001, at 32. Thus, the defendants assert that "[t]here is simply no dispute here for the Court to resolve." *Id.* The Court agrees, and declines to opine in the absence of a case or controversy. Nonetheless, the Court notes that the defendants' statement in their brief is "nothing less than an official interpretation of the [1998 Act] which the agency may not change unless it provides a reasoned explanation for doing so." *Washington Legal Foundation* v. *Henney*, 202 F.3d 331, 336 (D.C.Cir.2000).

2. Incumbent Concessioners' Duty to Bid

The NPHA also contests the legitimacy of 36 C.F.R. § 51.35. This section states:

> If the Director receives no responsive proposals, including a responsive proposal from a preferred offeror, in response to a prospectus for a qualified concession contract for which a preferred offeror exists, the Director must cancel the solicitation and may resolicit the concession contract or take other appropriate action in accordance with this part. No right of preference will apply to a concession contract resolicited under this section unless the contract is resolicited upon terms and conditions materially more favorable to offerors than those contained in the original contract.

36 C.F.R. § 51.35. NPHA argues that this regulation is an unlawful interpretation of section 403(4)(C) of the 1998 Act. That section reads:

> If all proposals submitted to the Secretary either fail to meet the minimum requirements or are rejected by the Secretary, the Secretary shall establish new minimum contract requirements and re-initiate the competitive selection process pursuant to this section.

16 U.S.C. § 5952(4)(C).

The gravamen of the disputed regulation lies in the incentives it creates for concessioners with statutory preferences in renewal. When a prospectus is issued and no bids are received (even one from the incumbent concessioner), the NPS, in an effort to obtain bidders, reissues the prospectus on terms that are more favorable to the concessioners. The problem with this, according to the NPS, is that a "no-bid" situation can occur for two different reasons. First, it might be that the prospectus was so poorly drawn that no entity is interested in being a concessioner under such terms. Or second, it might be that the terms are fair, but that no bidder wishes to spend the resources bidding with the expectation that the incumbent concessioner will likely obtain the contract in the end. If the second situation is the reason that no bids are received, then the NPS will end up re-drafting the prospectus with more favorable terms, even though the incumbent concessioner might be willing to accept the contract on the original terms. Thus, in many cases, an incumbent concessioner is able to attain better terms just by withholding its own bid.

The NPS regulation seeks to combat this disincentive for incumbent concessioners to bid. When a prospectus is reissued for the first reason — that is, the terms are unappealing for all bidders — then an incumbent concessioner would retain its preferential right of renewal. An original prospectus

is considered unappealing for all bidders when the new prospectus contains terms which are "materially more favorable" to concessioners. If, however, a prospectus is reissued for the second reason — an incumbent concessioner is willing to accept the contract but is holding out for more favorable terms — the incumbent concessioner forfeits its preferential right of renewal. Thus, under 36 C.F.R. § 51.35, an incumbent concessioner's clear incentive is to bid on every prospectus it is willing to accept.

The question before the Court is therefore whether Congress, in enacting the 1998 Act, "directly spoke[ ] to [this] issue," and if not, whether the "agency's [regulation] is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 841. The Court finds that Congress, by the text of the 1998 Act, has foreclosed the NPS's discretion on this issue. The statute clearly mandates what the NPS must do in a no-bid situation; it must "re-initiate the competitive selection process pursuant to [section 5952]." 16 U.S.C. § 5952(4)(C). Section 5952 provides a statutory right of preferential renewal to certain concessioners, and in no way makes this right contingent upon submitting a bid. The NPS's sole argument on this issue stands on the wisdom of its regulation, and completely overlooks the fact that Congress, in its own wisdom the Court must assume, has already addressed the issue. The Court therefore sets aside section 51.35 and any provision of the NPS's regulations to the extent a preferential right of renewal is made contingent upon factors not enumerated in 16 U.S.C. § 5952.

3. The Timing of the Determination of a Concessioner's Preferential Right of Renewal

The NPHA argues that the NPS is obligated to finally establish a concessioner's status as a preferred concessioner before the concessioner is obligated to bid on a prospectus. By delaying the final determination, argues the NPHA, the NPS is forcing concessioners to submit their own proposals

when they would otherwise wait and simply match the best proposal.[11] In this way, a concessioner enjoying a preferential right of renewal may nonetheless end up submitting a more aggressive proposal than a competitor.

The 1998 Act commands the NPS include in each prospectus "a description of a preferential right of renewal ... held by an existing concessioner." 16 U.S.C. § 5952(3)(H). In accordance with this, the NPS regulations require the NPS Director to determine whether a concessioner is a preferred offeror "no later than the date of issuance of a prospectus for the applicable new concession contract." 36 C.F.R. § 51.28. The Court fails to see any conflict between the NPS's regulation and the 1998 Act, and therefore declines to strike any regulatory provision on this issue.

4. The Intra-Agency Appeals Process

The plaintiffs allege a Fifth Amendment Due Process violation in the manner in which the NPS designates the person who adjudicates appeals. According to the NPHA, the NPS regulations provide that the Director of the NPS will not only make the initial determination on right of preference issues, but will also preside over the appeal of that decision. *See* Brief for Plaintiffs, Feb. 28, 2001, at 42.

In their brief, the defendants clarify that the initial determination whether an incumbent concessioner is entitled to a preferential right of renewal and the final determination on appeal will be handled by separate people. *See* Brief for Defendants, Apr. 9, 2001, at 35-36. Seeing that the dispute has

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[11] Although each prospectus identifies the preferred offeror for that concessions contract, a concessioner's preferred status, or lack thereof, is not final until an administrative appeal is exhausted. Because the NPS does not permit parties to pursue appeals until the bidding is complete, a preferred concessioner that is not so-labeled in the prospectus is forced to bid on a contract it would otherwise decline to bid on.

been obviated by the defendants' clarification, the Court will not opine on the matter except to note that the defendants' position is "nothing less than an official interpretation of the [1998 Act] which the agency may not change unless it provides a reasoned explanation for doing so." *Washington Legal Foundation*, 202 F.3d at 336.

5. The Requirement of a Stay Pending Intra-Agency Appeal

The NPHA argues that the defendants' rules on intra-agency appeal violate section 10(c) of the Administrative Procedure Act. That section provides for judicial review of final agency decisions, unless the agency provides "for an appeal to a superior agency authority," and meanwhile renders the disputed decision "inoperative." 5 U.S.C. § 704. The gist of the NPHA's argument is that a decision denying a concessioner a preferential right of renewal is not rendered "inoperative" unless the bidding process on that contract is stayed pending the resolution of the appeal. If the process is not stayed, then an erroneous decision by the initial decisionmaker will affect the bidding process, since "[b]ids by both incumbent and non-incumbent concessioners will, of course, vary based on whether the incumbent has a right to match the best proposal." *See* Brief for Plaintiffs, Feb. 28, 2001, at 44 n.8.

The Court disagrees that the NPS is in violation of Section 10(c). The core impact of a decision on a concessioner's preferential right of renewal is whether that concessioner will be permitted to match the best proposal. Thus, to render an initial decision on this issue "inoperative," the agency must see to it that the preferential right may still be exercised if finally determined to exist. The defendants have done this. Although the initial preferential right decision may exert certain collateral affects while pending appeal, it is a far stretch to say that the decision is therefore "operative." If that were the case, then a great majority (if not all) agency decisions

would remain operative pending appeal, because every decision has collateral effects well beyond the issue underlying the decision. For example, an initial agency decision will often serve as an impetus for parties to retain counsel or alter their travel plans. It cannot be said, however, that the decision is therefore "operating" on the parties prior to the appellate decision. The Court therefore finds that, because the central issue of a preferential right determination is rendered inoperative, the defendants are not in violation of section 10(c) of the APA.

6. The Information Used in the Determination of a Preferential Right of Renewal

The plaintiffs argue that the defendants plan to employ an "impermissibly vague" set of factors to determine whether a concessioner has performed satisfactorily during its contract, and is therefore entitled to a preference in renewal. *See* Brief for Plaintiffs, Feb. 28, 2001, at 44. Although the NPS usually makes this decision based on concessioners' annual evaluations, NPS regulations also permit the NPS to view "other relevant facts and circumstances." 36 C.F.R. § 51.44.

The defendants explain that this provision is not a license to investigate concessioners and hide the evidence from them until the time for renewal. Rather, it is a way of ensuring that, if it is determined after the fact that a concessioner's performance was actually less than satisfactory in a given year, the NPS can use that information in its consideration of whether, the concessioner's performance, on the whole, was indeed satisfactory.[12]

Therefore, with the understanding that the "other relevant facts and circumstances" that will be used by the defendants

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[12] The defendants explain that "there may be occasions when the NPS becomes aware of actions of a concessioner that may result in a determination of less than satisfactory performance that were not revealed in the annual evaluation." 65 Fed. Reg. at 20645.

in addition to the annual evaluations are only facts and circumstances "previously withheld from the NPS," there appears to be no dispute for the Court to resolve. Of course, as explained previously herein, the defendants' explanation in their brief is "nothing less than an official interpretation of the [1998 Act] which the agency may not change unless it provides a reasoned explanation for doing so." *Washington Legal Foundation*, 202 F.3d at 336.

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With the NPHA's objections to the defendants' regulations on concessioners' statutory right of preferential renewal resolved, the Court now turns to the next of the plaintiffs' arguments.

E. The Illusory Contract Issue

The plaintiffs next argue that two provisions in the NPS's proposed concession contract render the contract impermissibly ambiguous and illusory. The disputed provisions permit the NPS to impose additional duties on the concessioners during the life of the contract, and to terminate the contract at any time. See Standard Concessions Contract, 65 Fed. Reg. 26052. The Court disagrees and finds the NPS's standard concession contract acceptable under *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837 (1984).

1. The "Additional Duties" Provision

Section 5(a) of the NPS's standard concession contract requires the concessioner to "comply with all Applicable Laws in fulfilling its obligations under [the] CONTRACT at the Concessioner's sole cost and expense." 65 Fed. Reg. 26065. Section 2(a) of the contract defines "applicable laws" as "the laws of Congress governing the [park], including, but not limited to, the rules, regulations, requirements and policies promulgated under those laws, ... whether now in force or amended, enacted or promulgated in the future." 65 Fed. Reg. 26063.

This is a standard provision for these types of contracts, and has been "standard in NPS concession contracts for many years," including the ones currently held by the plaintiffs. 65 Fed. Reg. 26053. The plaintiffs nonetheless argue the NPS's right to impose additional duties on the concessioners renders the contract (1) impermissibly ambiguous, (2) illusory, and (3) contrary to section 407(a) of the 1998 Act. The Court disagrees on all three counts.

First, the court accepts the general notion that ambiguous bid solicitations are generally disfavored. *See International Ass'n of Firefighters* v. *United States Dep't of Navy*, 536 F. Supp. 1254, 1269 (D.R.I.1982). The Court, however, fails to find the solicitation ambiguous because the contested provisions are not capable of more than one interpretation. To the contrary, the provisions state quite clearly the conditions under which the concessioners' duties will change. The mere fact that the exact parameters of those duties are not known at the time of contracting does not somehow render the contract ambiguous. If that were the case, then all contracts would be ambiguous, since all parties to a contract must continually modify their performance to remain in accordance with changing laws.

Second, the Court fails to find any way in which these provisions make the contract illusory. An illusory contract is one in which one party "gives consideration that is so insignificant that an actual obligation cannot be imposed." *Woll* v. *United States*, 45 Fed. Cl. 475 (1999). The standard concession contract imposes a host of duties on the NPS, and the mere existence of the disputed provisions does not render the duties optional. Of course, in the unlikely event that the NPS were to pass so many regulations as to make all of its contractual duties optional, the plaintiffs might have a case. But that has not happened, and therefore, the contract as it currently stands is not illusory on account of these provisions.

Third, the Court finds that the contested provisions are not contrary to section 407(a) of the 1998 Act. This provision states:

> A concession contract shall provide for payment to the government of a franchise fee or such other monetary compensation as determined by the secretary upon consideration of the probable value to the concessioner [which] shall be based on a reasonable opportunity for net profit in relation to capital invested and the obligations of the contract.

The plaintiffs argue that, since the exact scope of concessioners' future duties is not known, and the 1998 Act only permits the franchise fee to be modified for "extraordinary and unanticipated" reasons, there is no way to ensure that the plaintiffs will maintain a "reasonable opportunity for net profit." That is, as a change in future duties could increase costs without simultaneously lowering the franchise fee, the provision permitting the imposition of additional duties is at odds with the opportunity to maintain a reasonable profit margin. Although the addition of future duties may increase costs, the plaintiffs are mistaken that the mere possibility of this is enough to make the current concession contract facially violative of the 1998 Act. There is no reason to believe that, these disputed provisions, by their very inclusion in the contract, *completely foreclose* the possibility that a concessioner could make a reasonable profit. It is quite possible, for example, that the NPS will factor the possibility of additional duties into the initial franchise fee. On the other hand, if such measures are not taken, and an additional duty imposed in the future does impair a concessioner's opportunity for reasonable profit, the concessioner's remedy is to bring a *Chevron*-based challenge against the new regulations. But for now, the plaintiffs' challenge must fail, as a claim based on the mere possibility of a future claim is not a claim at all.

2. The Unilateral Termination Provision

The standard concession contract issued by the NPS gives the NPS the right to "terminate [the] CONTRACT at any time in order to protect [park] visitors, protect, conserve and preserve [park] resources, or to limit visitor services in the [park] to those that continue to be necessary and appropriate." STANDARD CONCESSION CONTRACT, § 16(b)(1); 65 Fed. Reg. 26072. The plaintiffs argue that this gives the NPS the right to "cancel at [its] pleasure." Brief for Plaintiffs, Feb. 28, 2001, at 26.

The Court disagrees. The contract explicitly hinges the NPS's capacity to terminate on the necessity and appropriateness of the action. While the Court concedes that these terms do not have a precise meaning, it does not therefore follow that they have no meaning at all. Clearly, under the standard concession contract, the NPS cannot terminate the contract at its pleasure.

F. The Applicability of the Contract Disputes Act

One of the NPS's regulations implementing the 1998 Act declares that

> [c]oncession contracts are not contracts within the meaning of 41 U.S.C. § 601 et seq. (the Contract Disputes Act) and are not service or procurement contracts within the meaning of statutes, regulations or policies that apply only to federal service contracts or other types of federal procurement actions.

65 Fed. Reg. 20632, 20634. The plaintiffs argue that this regulation is contrary to law because the Contract Disputes Act ("CDA") is applicable to concession contracts and the NPS has no authority to circumscribe the applicability of the CDA. The Court finds that the CDA does not apply to concession contracts, and therefore that the disputed regulation is permissible.

The proper place to begin is with the text of the CDA. By its text, the Act applies to

> any express or implied contract ... entered into by an executive agency for —
>
> (1) the procurement of property, other than real property in being;
>
> (2) the procurement of services;
>
> (3) the procurement of construction, alteration, repair or maintenance of real property; or
>
> (4) the disposal of personal property.

41 U.S.C. § 602(a). The Court is thus faced with the question whether a concession contract is one of these enumerated contracts. Preliminarily, it is fair to narrow the list down to contracts (2) and (3). There is little argument that concession contracts are contracts for the procurement or disposal of personal property. The plaintiffs do not argue to the contrary.

The Court first finds that the CDA is ambiguous with respect to whether concession contracts are contracts listed in section 602(a)(2)-(3). On one hand, the government is receiving services; it is contracting for the provision of amenities to the visitors of its national parks. Moreover, because the concession contracts contain various terms relating to the stewardship of concession areas, *see* STANDARD CONCESSION CONTRACT, § 6(g), 9(a), 9(d), 10(a), 65 Fed Reg. at 26067-26068, it can be said that the government is also bargaining for the maintenance of real property. On the other hand, the basic nature of concession contracts differs markedly from that of typical procurement contracts; in concession contracts, the government is not attempting to procure chattel or services for itself, but is rather permitting another to use its land, as in a leasor/leasee relationship. In addition, when the

government procures something, it usually assumes the role of payor, not payee as in this case.

Given this ambiguity, the Court is next charged with determining whether the NPS regulation is a reasonable interpretation of the section 602 of the CDA. *See Chevron*, 467 U.S. at 841. The Court finds that it is. First and foremost in support of this conclusion is the Congressional statement that concession contracts are contracts "to authorize a person, corporation or other entity to provide accommodations, facilities and services to visitors to units of the national park system." 16 U.S.C. § 5952. Thus, Congress sees concession contracts as authorization contracts, not procurement contracts. This view is further supported by the fact that, when Congress defined a concession contract as such in 1998, the prevailing understanding was that concession contracts were not procurement contracts. This understanding is evidenced in two significant ways. First, NPS regulations implementing the 1965 Act expressly state that concession contracts "are not Federal procurement contracts or permits within the meaning of statutory or regulatory requirements applicable to Federal procurement actions." 36 C.F.R. 51.1. Second, the Court of Federal Claims decided in 1993 that concession contracts "did not constitute a procurement," because the NPS is not paying funds, but "collecting fees in exchange for granting a permit to operate a concession business." *YRT Services Corporation* v. *United States*, 28 Fed. Cl. 366, 392 n.23 (1993). Given that this was the prevailing understanding of concession contracts in 1998, it is presumed that Congress was aware of and therefore adopted this view by enacting the 1998 Act without changing it.[13] *See Lorillard* v.

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[13] It is worth noting that, while legislative history is far from a definitive indicator, a Senate report on the 1998 Act does speak to this issue. According to the report, "the policies and procedures of this title as implemented by the Secretary's regulations are governing requirements for concession contracts and that such contracts do not constitute contracts for the procurement of goods and ser-

Pons, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change ..."); *see also Keene Corp.* v. *United States*, 508 U.S. 200, 212 (1993).

In light of this understanding of the 1998 Act, the Court is confident that the NPS's classification of concession contracts is "based on a permissible construction of the statute." *Chevron*, 467 U.S. at 841. In arguing to the contrary, the plaintiffs cite certain cases where various non-Article III tribunals have found to the contrary. *See* Brief for Plaintiffs, Feb. 28, 2001, at 30-34 (citing, *e.g.*, *In re R & R Enters.*, IBCA No. 2417, 1989 WL 27790, at *58 (1989)). For the most part, these cases all pre-date the passage of the 1998 Act. And since the 1998 affirmed the "authorization" model of concession contracts, these cases can be considered rejected by the 1998 Act. Although one case, *Appeal of Watch Hill Concessions, Inc.*, IBCA 4284/2000, was decided after 1998, the Court is not bound in any way by that tribunal's decision. Moreover, the mere fact that another interpretation exists does not render the NPS's interpretation incorrect, because the NPS interpretation "need not be the only or most reasonable interpretation." *See Chevron*, 467 U.S. at 843 n.11. Rather, it need only be "rational and consistent with the statute," which the Court finds it to be. *NLRB* v. *United Food & Commercial Workers Union*, 484 U.S. 112, 123 (1987).

G. The Bid Evaluation Issue

The plaintiffs argue that the NPS's method of selecting the winning bid for each concession contract impermissibly varies from the mandates of the 1998 Act. The Court disagrees.

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vices for the benefit of the Government or otherwise." S. Rep. 105-202, 105th Cong., 2d Sess . at 39 (June 5, 1998).

The 1998 Act states the following with respect to bid selection:

> (A) In selecting the best proposal, the Secretary shall consider the following principal factors:
>
> > (i) The responsiveness of the proposal to the objectives of protecting, conserving, and preserving resources of the unit of the National Park System and of providing necessary and appropriate facilities and services to the public at reasonable rates.
> >
> > (ii) The experience and related background of the person, corporation, or entity submitting the proposal ...
> >
> > (iii)The financial capability of the person, corporation, or entity submitting the proposal.
> >
> > (iv) The proposed franchise fee....

16 U.S.C. § 5952. The 1998 Act also permits the Secretary to "consider such secondary factors as the Secretary deems appropriate ." 16 U.S.C. § 5952(5)(B). With regard to the weight accorded to each factor, the Act orders the NPS to weigh the proposed franchise fee less than the factors listed in (i). *See* § 5952(5)(A)(iv). Other than this, however, the 1998 Act does not specify how these factors shall be weighed.

In implementing this statute, the NPS promulgated the following regulation:

> (a) The five principal selection factors are:
> > (1) The responsiveness of the proposal to the objectives, as described in the prospectus, of protecting, conserving, and preserving resources of the park area;

(2) The responsiveness of the proposal to the objectives, as described in the prospectus, of providing necessary and appropriate visitor services at reasonable rates;

(3) The experience and related background of the offeror, including the past performance and expertise of the offeror in providing the same or similar visitor services as those to be provided under the concession contract;

(4) The financial capability of the offeror to carry out its proposal; and

(5) The amount of the proposed minimum franchise fee, if any, and/or other forms of financial consideration to the Director. However, consideration of revenue to the United States will be subordinate to the objectives of protecting, conserving, and preserving resources of the park area and of providing necessary and appropriate visitor services to the public at reasonable rates.

16 C.F.R. § 51.17. In accounting for each of these factors, the NPS utilizes a point system: an applicant can earn from 0 to 5 points for each of the first four factors, and can earn from 0 to 4 points on the franchise fee factor. For certain types of contracts, the NPS considers two additional, or "secondary", selection factors and awards them between 0 and 3 points:

(b) The secondary selection factors are:

(1) The quality of the offeror's proposal to conduct its operations in a manner that furthers the protection, conservation and preservation of park area and other resources through environmental management programs and activities, including, without limitation,

energy conservation, waste reduction, and recycling ...; and

(2) Any other selection factors the Director may adopt in furtherance of the purposes of this part, including where appropriate and otherwise permitted by law, the extent to which a proposal calls for the employment of Indians (including Native Alaskans) and/or involvement of businesses owned by Indians, Indian tribes, Native Alaskans, or minority or women-owned businesses in operations under the proposed concession contract.

36 C.F.R. § 51.17(b).

The plaintiffs argue that the NPS's regulations are arbitrary and capricious because they "dramatically alter the weights of the selection criteria from those that Congress saw fit to assign." Brief for Plaintiffs, Feb. 28, 2001, at 36. According to the plaintiffs' reading of the 1998 Act, Congress intended to "establish three co-equal factors ... as well as a fourth subordinate factor." *Id.*

The Court finds that, with regard to the total number of factors to be considered, and the weight to be attributed to each one, Congress has not "directly spoken to the issue." *Chevron*, 467 U.S. at 841. The Court further finds that the disputed provisions are "based on a permissible construction of the statute." *Id.* With regard to the total number of factors considered, there is little argument that Congress meant to narrow the selection process to *only* the four enumerated factors. First and most obviously, the statute fails to use the word "only," which would be the most expedient and direct way to limit the evaluation criteria. Second, the statute explicitly contemplates the consideration of supplemental factors which the "Secretary deems appropriate." 16 U.S.C. § 5952(5)(B). Thus, there is very little reason to think that Congress' four-factor list is meant to be wholly exhaustive.

With regard to the weight to be applied to the various factors, the 1998 Act only addresses the weighing of one factor: the franchise fee is to be weighed less than the first statutory factor. The Act is conspicuously silent on all other weighing issues, and this silence must be interpreted to permit the NPS to weigh the remaining factors as it sees fit. *See National Rifle Ass'n*, 216 F.3d at 130-31 (where Congress includes particular language in one section of a statute, but omits it in another, the omission is presumed to be intentional). Of course, the NPS could weigh some factors so heavily, and others . . lightly, that the weighing system effectively eliminates one factor from consideration. If this were the case, it would be a violation of the NPS's duty to weigh all the factors. *See Motor Vehicle Manufacturers Ass'n* v. *State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983); *Texas Oil & Gas Ass'n* v. *U.S. EPA*, 161 F.3d 923, 934 (5th Cir.1998) ("Although the EPA has significant discretion in deciding how much weight to accord each statutory factor under the [Clean Water Act], it is not free to ignore any individual factor entirely." (citations omitted)). But the current point system does no such thing; the franchise fee is still being weighed and is not being minimized to the extent of de facto exclusion.

Thus, the Court concludes that the NPS's system of selecting the winning bid for concession contracts is "rational and consistent with the statute." *NLRB* v. *United Food & Commercial Workers Union*, 484 U.S. 112, 123 (1987); *see also General Elec. Co.* v. *United States Envtl. Protection Agency*, 53 F.3d 1324, 1327 (D.C.Cir.1995).

H. Leasehold Surrender Interests

The plaintiffs claim that the defendants' regulations deprive them of leasehold surrender interests granted to them by the 1998 Act. Generally speaking, a leasehold surrender interest is a leasee's monetary interest in the improvements he makes to property during his lease. When the lease is

terminated, the leasee may then recoup the approximate value of his improvement. In 1998, Congress decided that concessioners, who often build extensive facilities on national park grounds, should be entitled to the value of certain improvements made on park property. Congress therefore granted each concessioner a "leasehold surrender interest in each capital improvement constructed by [the] concessioner." 16 U.S.C. § 5954(a)(1). "Capital improvement" is defined by the 1998 Act as "a structure, fixture, or nonremoveable equipment provided by a concessioner pursuant to the terms of a concession contract." 16 U .S.C. § 5954(e)(2).

The plaintiffs take issue with 36 C.F.R. § 51.67, which states:

> A concessioner will not obtain initial or increased leasehold surrender interest as a result of repair and maintenance of real property improvements unless a repair and maintenance project is a major rehabilitation.

36 C.F.R. § 51.67. A "major rehabilitation" is in turn defined as a "planned comprehensive rehabilitation of an existing structure, ... [t]he construction cost of which exceeds fifty percent of the pre-rehabilitation value of the structure." 36 C.F.R. § 51.51. Finally, "pre-rehabilitation value" is defined as "the replacement cost of the structure less depreciation." *Id.* The plaintiffs argue that this regulation is contrary to the 1998 Act because the 1998 Act grants a leasehold surrender interest in "each capital improvement," not just the ones costing more than half a facility's existing value. For example, the plaintiffs argue that replacing a brick fireplace in the historic El Tovar Hotel at the Grand Canyon is clearly a capital improvement, and should give rise to a leasehold interest, even though the project's cost is nowhere near half the value of the hotel. Without expressing any opinion on the plaintiffs' example, the Court disagrees with the plaintiffs' reasoning.

Paramount to the plaintiffs' argument is their understanding of a capital improvement. They argue that the "plain meaning" of statutory language should control, and that the plain meaning of "capital improvement" is an "expenditure[ ] that add[s] to the value of an asset or materially prolongs its economic life." *See* Brief for Plaintiffs, Feb. 28, 2001, at 5. The plaintiffs falter, however, in that the 1998 Act explicitly defines capital improvement, thus rendering any colloquial definition irrelevant. "Capital improvement" is explicitly defined as "a structure, fixture, or nonremoveable equipment provided by a concessioner pursuant to the terms of a concession contract." 16 U.S.C. § 5954(e)(2). Nothing in the disputed regulation withholds a leasehold surrender interest from a concessioner who makes a capital improvement.[14] Rather, the regulation only addresses the "repair and maintenance" of concession facilities. Moreover, because there is nothing in the 1998 Act that gives rise to a leasehold surren-

[14] The Court does note that the defendants define the word "structure", "fixture", and "nonremoveable equipment" in the regulations. *See* 36 C.F.R. § 51.51. Thus, it might be argued that an especially narrow regulatory definition of "structure", for example, could preclude a concessioner from obtaining a leasehold interest. The plaintiffs address this issue for the first time in their reply brief, and make the argument that, according to Oxford American Dictionary, "structure" refers not only to "buildings" but also "parts of buildings." See Brief for Plaintiffs, April 30, 2001, at 9. If this is true, then the word structure, being susceptible to more than one definition, is ambiguous. *See Securities Indus. Ass'n* v. *Board of Governors of Fed. Reserve Sys.*, 847 F.2d 890, (D.C.Cir.1988) (referring to a dictionary to determine whether a word is susceptible to more than one meaning, and therefore ambiguous). The ambiguity in turn requires this Court to defer to an agency's reasonable interpretation. In the case at hand, the agency's definition encapsulates a standard definition of structure and is therefore eminently reasonable. The defendants' definitions of fixture and nonremoveable equipment, which the plaintiffs do not challenge, likewise raise no concerns of unreasonableness.

der interest for repair and maintenance, the plaintiffs are actually better off with the regulation in place. Under the current regulations, the plaintiffs will be able to obtain a leasehold surrender interest for major rehabilitations that are not otherwise classified as capital improvements.

The Court therefore finds that the defendants' regulation concerning leasehold surrender interests for the repair and maintenance of concession facilities, 36 C.F.R. § 51.67, is permissible.

I. The Repair and Maintenance Reserve

The plaintiffs argue that the defendants' regulation requiring concessioners to contribute funds into a repair and maintenance fund violates the 1998 Act. Specifically, the plaintiffs claim that, since the fund proceeds are used for capital improvements, concessioners should have a leasehold surrender interest for the amount of money contributed to the fund.

In order to obtain a concession contract, concessioners must agree to "establish and manage a Repair and Maintenance Reserve, [the funds of which] shall be used to carry out ... [nonroutine] repair and maintenance of Concession Facilities." Standard Concession Contract, § 10(c); 65 Fed. Reg. 26069. According to the standard contract, the fund is designated for projects that are "non-recurring within a seven-year time frame," such as:

> repair or replacement of foundations, building frames, window frames, sheathing, subfloors, drainage, rehabilitation of building systems such as electrical, plumbing, built-in heating and air conditioning, roof replacement and similar projects.

Id. The contract further states that monies from this fund "shall not be used for a major rehabilitation" and that the concessioner shall "obtain no ... Leasehold Surrender Interest

... as a consequence of the expenditure of Repair and Maintenance Reserve Funds." *Id.*

In light of these regulatory provisions, as well as the provisions of the 1998 Act which guarantee concessioners a leasehold surrender interest for "capital improvements," the Court must determine whether the uses of the Repair and Maintenance Reserve are capital improvements. If they are, then the plaintiffs are due a leasehold surrender interest and the defendants' standard contract and regulations are unlawful. If the Reserve funds are not used for capital improvements within the meaning of the 1998 Act, then the disputed regulations are clearly acceptable.

To a large extent, the Court can only partially answer this question. This is because the list of enumerated uses for the Reserve funds is clearly not exhaustive, and even if it were, the uses are described so generally that it is impossible to categorize a use into a single category. For instance, the "rehabilitation" of a heating system may include the installation of a furnace, which likely is a capital improvement. On the other hand, a "rehabilitation" might only involve a draining of a building's radiators, which is not likely a capital improvement. Thus, although the denial of a leasehold surrender interest may be unlawful in some circumstances (*i.e.* in cases where the maintenance amounts to a capital improvement), the Court cannot say that the regulation, on its face, will be unlawful in its every application. Thus, this challenge to the regulation must fail. However, if in the future the plaintiffs can show that they were forced to expend Reserve funds on a project amounting to a capital improvement, they might have a viable claim that the Secretary acted arbitrarily and capriciously in disbursing Reserve funds. Until then, however, the regulation stands unaltered.[15]

[15] The Court also rejects the plaintiffs' argument that the Repair and Maintenance Reserve violates section 407 of the 1998 Act, 16 U.S.C. § 5952, by "divert[ing] concessioner revenues away from the purposes specified by [the 1998 Act]." Brief for Plaintiffs, Feb. 28, 2001, at 9. Section 407 of the 1998 Act deals with the accounting and expenditure of franchise fees paid by concessioners. These fees are computed "based upon a [concessioner's] reasonable opportunity for net profit in relation to the capital invested and the obligations of the contract." 16 U.S.C. § 5956(a). Thus, because the Repair and Maintenance Reserve is an "obligation[ ] of the contract," franchise fees are not "diverted" from the purposes specified in section 407. If they were, then every obligation in the contract which differed from the purposes of section 407 would be an improper "diverting" of funds.

J. The Definition of Construction Costs

The plaintiffs argue that the defendants' regulatory definition of the statutory term "construction costs" is unreasonable.

In defining the scope of concessioners' leasehold surrender interests, the 1998 Act provides that "[t]he value of a leasehold surrender interest in a capital improvement shall be an amount [derived from the] construction cost of the capital improvement." 16 U.S.C. § 5954(a)(3). Under the formula provided in the Act, the greater the construction costs, the great a concessioner's leasehold surrender interest. *Id.* The defendants define "construction costs" as "the total of the incurred eligible direct and indirect costs necessary for constructing or installing the capital improvement." 36 C.F.R. § 51.51 "Eligible direct costs" are in turn defined as costs that are "necessary both for the construction of a capital improvement and are typically elements of a construction contract." *Id.* Finally, "eligible indirect costs" are "all other incurred capitalized costs ... necessary for the construction of a capital improvement." *Id.* Likely examples of eligible indirect costs are "architectural and engineering fees for plans", "environmental studies", "risk insurance", and "fees or service charges and interest on construction loans." *Id.*

The plaintiffs argue that the defendants' definition of "construction costs" is unreasonable because it fails to "encompass[ ] administrative expenses, such as legal fees related to capital improvements." Brief for Plaintiffs, Feb. 28, 2001, at 13. The Court squarely disagrees. First, the Court finds that the term "construction cost" is not self-defining; *i.e.*, it is "silent or ambiguous" with respect to the myriad of separate costs, such as legal fees, that emanate from a major construction project. *Chevron*, 467 U.S. at 841. Given this ambiguity, the Court next finds that the defendants' definition of the term is reasonable. The definition encompasses a broad variety of expenses involved in construction, and explicitly relies on professional resources such as the "Dictionary of Architecture and Construction." *See* 65 Fed. Reg. 20650. Of course, some expenses that relate to construction are excluded, but some lines must be drawn. Otherwise, "construction costs" will end up including expenses far flung from the construction of the building, such as sales and marketing costs. *See* Fed. Reg. 20650. But the Court need not find that such costs should not be included; indeed, it is beyond this Court's judicial role to make such a determination. Rather, the Court need only measure whether the defendants' interpretation is reasonable, which the Court finds it to be.

Also on the subject of construction costs, the plaintiffs object to the defendants' condition that individual construction costs "be no higher that those prevailing in the locality of the project." 36 C.F.R. § 51.51. The plaintiffs argue that this "prevailing rate" standard fails to account for concessioners' added costs of "regulatory compliance." *See* Brief for Plaintiffs, Feb. 28, 2001, at 13. This point, even if true, is of no consequence to this tribunal unless it renders the prevailing rate standard unreasonable. But it does not; the prevailing rate standard is an eminently reasonable interpretation of the ambiguous statutory term "construction costs."

K. The Leasehold Surrender Interest in Replaced Fixtures

The plaintiffs argue that the defendants' regulation dealing with a concessioner's leasehold surrender interest in replaced fixtures, 36 C.F.R. § 51.65, violates the 1998 Act.

The relevant regulation states:

> A concessioner that replaces an existing fixture in which the concessioner has a leasehold surrender interest with a new fixture will increase its leasehold surrender interest by the amount of the construction cost of the replacement fixture less the construction cost of the replaced fixture.

36 C.F.R. § 51.65. The plaintiffs argue that this regulation is contrary to 16 U.S.C. § 5954(a)(5), which states:

> Where a concessioner ... makes a capital improvement to an existing capital improvement in which the concessioner has a leasehold surrender interest, the cost of such additional capital improvement shall be added to the then current value of the concessioner's leasehold surrender interest.

16 U.S.C. § 5954(a)(5). Elsewhere in the 1998 Act, Congress defines a "capital improvement" as a "structure, fixture, or nonremoveable equipment." 16 U.S.C. § 5954(e)(2).

The decision on this issue hinges on whether Congress "directly spoke[ ] to the issue" of leasehold surrender interests when fixtures are replaced. *Chevron*, 467 U.S. at 841. For, if the Act is ambiguous in this regard, the regulation will stand as it is a reasonable way to account for leasehold surrender interests in the fixture-replacement context.[16] If the

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[16] The reasonableness of regulation is demonstrated by considering the competing alternatives in the context of a simple example. If a hotel owner with a leasehold surrender interest in the hotel were to replace the hotel furnace once every five years for 15

Act is not ambiguous, however, the disputed regulation must fall, as it conflicts with the "unambiguously expressed intent of Congress." *Id.* at 841.

The Court finds that the 1998 Act is ambiguous with regard to the calculation of leasehold surrender interests for replaced fixtures. Section 5954(a)(5), the only section of the Act which *might* address fixture replacement, does not address the replacement of a fixture; it clearly *addresses* the addition of a fixture (or capital improvement) to an existing fixture (or capital improvement). For example, when a concessioner adds a new wing to part of a guest lodge, section 5954(a)(5) entitles him to increase his leasehold surrender interest by the cost of this addition. Likewise, if the concessioner were to, years later, add an air conditioning system to this addition, section 5954(a)(5) permits him to increase his leasehold surrender interest by the cost of the air conditioning system as well. Section 5954(a)(5)'s focus on *adding* capital improvements, as opposed to *replacing* capital improvements, is made clear by the text of the statute. First, the section limits its application to circumstances where concessioners "make[ ] a capital improvement to an existing capital improvement." This language is clearly language of addition, as it would be difficult make a capital improvement to something if that something was removed from the picture.

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years, the plaintiffs' proposed accounting would be to increase the leasehold surrender interest three separate times by the cost of the furnace. Under this approach, the hotel owner would hold a leasehold surrender interest equal to four furnaces, even though the hotel would only contain one. The defendants' approach would be to increase the leasehold surrender interest by the cost of the new furnace, but also to decrease it by the cost of the replaced furnace. Under this approach, the hotel owner's leasehold surrender interest would reflect a single furnace at the price level of the final purchase. This latter approach is a logical and reasonable way of accounting for a concessioner's leasehold surrender interest when fixtures are replaced.

Second, the statute even uses the word "addition", as it provides that the cost of the "additional capital improvement shall be added to" the concessioner's leasehold surrender interest.

Despite this reading of the statute, it might still be argued (in a particularly tortuous way) that certain replacement fixtures are covered by the language of section 5954(a)(5). Using the example above, one could argue that, since the lodge's new wing is a "capital improvement" and the air conditioning system added to that wing is a "capital improvement", then, if the air conditioning system was later replaced with a new system, it could be said that this new system was not a "replacement", but simply an "addition" of a capital improvement (the air conditioning system) to an already-existing capital improvement (the new wing). This interpretation strains the statute to the point of breaking. It is wholly illogical to think that Congress sought to provide leasehold surrender interests for replacement fixtures in a new wing, but not in the original lodge.

Thus, because no provision of the 1998 Act speaks directly to the issue of leasehold surrender interests in replacement fixtures, and the defendants' regulation dealing with the issue is reasonable, the Court finds that the regulation is permissible.

L. Depreciation for Functional Obsolescence

The plaintiffs argue that the defendants' regulation on depreciation violates the clear language of 16 U.S.C. § 5954(a)(3). Specifically, the plaintiffs claim that section 5954(a)(3) orders assets to be depreciated only for "wear and tear", and not for "functional obsolescence" as well. *See* Brief for Plaintiffs, Feb. 28, 2001, at 19. Although the defendants' regulation mirrors section 5954(a)(3), *see* 36 C.F.R. § 51.51, the plaintiffs claim that the defendants intend to include functional obsolescence in its regulation as a matter of practice. In their brief, the defendants respond by as-

suring the plaintiffs that "functional obsolescence is not a consideration in the determination of depreciation under the new concession regulations." Brief for Defendants, Apr. 9, 2001, at 27. Therefore, because a dispute on this issue no longer remains, the Court will not opine on the matter except to note that the defendants' position is "nothing less than an official interpretation of the [1998 Act] which the agency may not change unless it provides a reasoned explanation for doing so." *Washington Legal Foundation*, 202 F.3d at 336.

M. The Use of Leasehold Surrender Interests in Financing

The plaintiffs argue that the defendants' regulation improperly prevents them from pledging their leasehold surrender interests as collateral for financing. Specifically, the plaintiffs claim that they are improperly prohibited from pledging their leasehold surrender interest in one national park for a loan needed to make an improvement in another national park.[17]

Section 5954(a)(2)(A) of the 1998 Act states that a leasehold surrender interest

> may be pledged as security for financing of a capital improvement or the acquisition of a concessioner's

[17] The Court also notes that part of the plaintiffs' argument on this matter has been rendered moot. In their complaint and summary judgment motion, the plaintiffs argued that the defendants' regulations prevented them from using leasehold surrender interests as collateral in re financing. In their opposition, the defendants explained that the "general types of refinancing suggested by the plaintiffs are appropriate [under 36 C.F.R. § 51.87]." *See* Brief for Defendants, Apr. 9, 2001, at 28. Although the Court need not now consider this issue, the Court does note that the defendants' statement, inasmuch as it addresses the specific issue, is tantamount to an official enunciation of their policy on this issue. *See Washington Legal Foundation*, 202 F.3d at 336.

> contract when approved by the Secretary pursuant to this subchapter.

16 U.S.C. § 5954(a)(2)(A). The defendants' regulation, codified at 36 C.F.R. § 51.87, states that a leasehold surrender interest may be encumbered

> either to finance the construction of capital improvements under the applicable concession contract in the applicable park area or to finance the purchase of the applicable concession contract.

36 C.F.R. § 51.87.

To begin with, the 1998 Act explicitly makes the securitization of every loan subject to the "approv[al] of the Secretary." Thus, Congress specifically gave the NPS a significant role in deciding when leasehold surrender interests may be pledged as security. Second, the Court sees no provision of the 1998 Act which "sp[eaks] directly to the issue" of whether a concessioner may pledge his leasehold surrender interest in one park for a loan in another park. *Chevron*, 467 U.S. at 841. The plaintiffs argue to the contrary, citing the definition of "capital improvement." *See* Brief for Plaintiffs, Feb. 28, 2001, at 25. The 1998 Act defines a capital improvement as a

> structure, fixture, or nonremoveable equipment provided by a concessioner pursuant to the terms of a concessions contract and located on the lands of the United States within a unit of the National Park System.

16 U.S.C. § 5954(e)(2). The plaintiffs assert that, because the 1998 Act permits the securitization of leasehold surrender interests to finance a "capital improvement," and the statutory definition of "capital improvement" refers to "a concessions contract ... within a unit of the National Park System," Congress has "directly spoken to the issue" of whether an interest in one park may be used to secure a loan for a project

in a separate park. *Chevron*, 467 U.S. at 841; *see also* Brief for Plaintiffs, Feb. 28, 2001, at 25.

This argument is preposterous. It strains even the most active imagination to think that Congress addressed the crosspark collateralization of concession loans in such a labyrinthian way. Finding that the 1998 Act is "silent or ambiguous with respect to [this] issue," the Court next finds the disputed regulation to be a reasonable interpretation of the Act. The regulation is grounded in the rational belief that cross-park collateralization expands the deleterious effects of loan defaults. A default on a cross-collateralized loan would put several facilities in several parks at risk. Moreover, when a bank forecloses on a loan, the bank will install its own replacement concessioner resulting in doubtless transitional inconveniences and miscues. *See* Brief for Defendants, Apr. 9, 2001, at 30. With this understanding, the Court has little hesitation in finding the disputed regulation to be reasonable.

N. The Timing of Compensation for a Concessioner's Leasehold Surrender Interest

The plaintiffs argue that the defendants' regulation addressing the payment of former concessioners' leasehold surrender interests is contrary to law. The Court finds that the plaintiffs have no standing to make this claim.

The disputed regulation, 36 C.F.R. § 51.61(a), states the following:

> The date for payment of the leasehold surrender interest value, except in special circumstances beyond the [NPS's] control, will be the date of expiration or termination of the surrender interest contract, or the date the concessioner ceases to utilize related capital improvements under the terms of the concession contract.

The plaintiffs argue that this regulation is contrary to 16 U.S.C. § 5954(c), which reads in part:

> Upon expiration or termination of a concessions contract entered into after the effective date of this subchapter, a concessioner shall be entitled under the terms of the concessions contract to receive from the United States or successor concessioner the value of any leasehold surrender interest in a capital improvement as of the date of such expiration or termination.

Viewing the defendants' regulation and the 1998 Act together, the Court first observes that section 5954(c) only applies to concession contracts entered into after the effective date of the 1998 Act, which is November 13, 1998. Three of the four plaintiffs now in front of the Court (Amfac, Aramark, and Hamilton Stores) entered into their contracts before this date. Thus, their contracts are not controlled by the terms of section 5954(c), and they have cited no other statutory provision which the defendants' regulation allegedly violates. Their motions on this issue are thus denied.[18]

The fourth plaintiff, the National Park Hospitality Association ("NPHA"), undoubtedly has members with concession contracts entered into after November 13, 1998. However, there is no way to determine whether an injury is actual or imminent unless the Court focuses on the expiration dates of specific contracts of NPHA members. As such, the resolution of this issue would require the "individual participation" of NPHA members, a factor that has long stood in the way of associational standing. *Warth* v. *Seldin*, 422 U.S. 490, 511 (1975); *see also Harris* v. *McRae*, 448 U.S. 297,

---

[18] To clarify the Court's holding, the Court does not find that these plaintiffs have no standing. As long as they have valid concession contracts, and the disputed regulation still applies to them, they have standing to challenge the regulation. However, their claims fail on the merits because, without the applicability of section 5954(c), they have no statutory provision which even remotely grants them a right on which the defendants' regulation infringes.

320-21 (1980) (finding an association to lack standing because the cause of action required the court to assess the motivations of specific association members); *Parks* v. *United States Internal Revenue Serv.*, 618 F.2d 677, 684-85 (10th Cir.1980) (denying a union standing because the alleged damages were "individual ... [and] not common to nor shared by all of the union members."). The Court therefore dismisses this claim from each of the plaintiffs' complaints pursuant to Federal Rule of Civil Procedure 12(b)(1).

O. The Defendants' Restrictions on Concessioners' Corporation Control Transfers

The plaintiffs claim that the defendants' regulation permitting NPS review of corporate control transfers is contrary to the 1998 Act. The Court disagrees.

The relevant provision of the 1998 Act states:

> No concessions contract or leasehold surrender interest may be transferred, assigned, sold, or otherwise conveyed or pledged by a concessioner without prior written notification to, and approval by, the Secretary.

16 U.S.C. § 5957. The defendants' regulation implementing this provision states:

> The concessioner may not assign, sell, convey, grant, contract for, or otherwise transfer (such transactions collectively referred to as "assignments" for purposes of this part), without the prior written approval of the Director, any of the following:
>
> (a) Any concession contract;
>
> (b) Any rights to operate under or manage the performance of a concession contract as a subconcessioner or otherwise;
>
> (c) Any controlling interest in a concessioner or concession contract; or

> (d) Any leasehold surrender interest or possessory interest obtained under a concession contract.

36 C.F.R. § 51.85. The plaintiffs specifically argue that the 1998 Act gives the defendants no permission to approve or disapprove of any transfer of a controlling interest of a concessioner. *See* 36 C.F.R. § 51.85(c).

The Court first finds that the statutory language "or otherwise conveyed or pledged" is wholly silent with respect to the instant issue. That is, the terms "conveyed" and "pledged" have a multitude of meanings, no particular one of which is made clear in the statute. Thus, finding the terms to be ambiguous on this issue, the Court considers the reasonableness of the defendants' regulation.

The Court has little hesitation in declaring the reasonableness of 36 C.F.R. § 51.85. Elsewhere in the 1998 Act, Congress instructs the Secretary to disapprove contract transfers if the acquiring party is not "qualified or able to satisfy the terms and conditions of the concession contract" or, if the transfer would not be "consistent with the objectives of protecting, conserving, and preserving the resources ... of the National Park System." 16 U.S.C. § 5957(b). In light of these objectives, the defendants' regulation is a reasonable way to ensure that unqualified persons or entities do not put at risk any of our nation's natural treasures. If a company owning a concession contract were to be sold to another company, that new company (which might even be foreign to the United States) might have a wholly different policy or attitude with respect to its role as a concessioner. Moreover, even though this regulation remains in place, concessioners denied the right to transfer business interests can always bring an arbitrary and capricious claim, alleging that the NPS is misapplying section 5957(b). On its face, however, the regulation must stand.

P. Conclusion

In conclusion, after reviewing the cross motions for summary judgment and the applicable law, the Court finds that the disputed regulations are permissible in all respects except one: the defendants may not deprive a concessioner of a preferential right of renewal if the concessioner fails to bid on a prospectus.

III. CONCLUSION

For the foregoing reasons, the Court DENIES the plaintiffs' Rule 56(f) motion; GRANTS in part and DENIES in part the defendants' motion to dismiss; GRANTS in part and DENIES in part the plaintiffs' joint motion for summary judgment; and GRANTS in part and DENIES in part the defendants' motion for summary judgment. An order consistent with this Opinion shall issue separately this date.

ORDER

Consistent with the Memorandum Opinion issued this date, it is hereby

ORDERED that the defendants' motion to dismiss [11-1, 8-1, 12-1, 6-1] is DENIED as to all claims, except with respect to the timing of compensation for a concessioner's leasehold surrender interest and Hamilton Stores' franchise fee claim, for which it is GRANTED. It is therefore ORDERED that the plaintiffs' claim with respect to the timing of compensation for a concessioner's leasehold surrender interest and the franchise fee claim of Hamilton Stores are DISMISSED WITH PREJUDICE. Further, it is

ORDERED that the defendants' motion for summary judgment [11-2, 8-2, 12-2, 6-2] is GRANTED as to all issues addressed therein, except with respect to the forfeiture of a concessioner's statutory right of preferential renewal under 36 C.F.R. § 51.35, for which it is DENIED. It is therefore ORDERED that all of the plaintiffs' claims addressed in the

defendants' January 18, 2001 motion for summary judgment, except for the claim regarding the forfeiture of a concessioner's statutory right of preferential renewal under 36 C.F.R. § 51.35, are DISMISSED WITH PREJUDICE. Further, it is

ORDERED that the plaintiffs' joint motion for partial summary judgment on the regulations pertaining to the contractual right of preference in renewal [35-1, 28-1, 39-1, 18-1] is DENIED with respect to all issues presented therein; further, it is

ORDERED that the plaintiffs' joint motion for summary judgment on the regulations pertaining to contract performance and concessioner choice issues [36-1, 29-1, 40-1, 19-1] is DENIED with respect to all issues presented therein, except for the forfeiture of a concessioner's statutory right of preferential renewal under 36 C.F.R. § 51.35, for which it is GRANTED. It is therefore DECLARED that 36 C.F.R. § 51.35 is contrary to law to the extent it deprives concessioners of a statutory right of preferential renewal for not bidding on a prospectus. Further, it is ORDERED that the defendants are enjoined from applying 36 C.F.R. § 51.35 to the extent that the application deprives concessioners of a statutory right of preferential renewal for not bidding on a prospectus. Further, it is

ORDERED that the plaintiffs' joint motion for summary judgment on the regulations pertaining to concessioner investment and corporate control issues [37-1, 30-1, 41-1, 20-1] is DENIED with respect to all issues presented therein; further, it is

ORDERED that Hamilton Stores' motion for summary judgment of the franchise fee issue [64-1] is DENIED; further, it is

ORDERED that plaintiff Aramark's motion to extend time filed on January 19, 2001 [Civ. A. No. 00-3085, 10-1] is GRANTED; further, it is

ORDERED that plaintiff Hamilton Stores' motion to extend time filed on April 30, 2001 [Civ. A. No. 00-2937, 61-1] is GRANTED; further it is

ORDERED that the plaintiffs and the defendants, within 10 days of this date, file with the Court a description of all alleged claims, that have not been ruled on by the Court. Each claim shall contain a citation to the portion of the complaint lodging that claim. A proposed order setting a schedule for the resolution of any remaining claims shall also be attached.

Further, the Clerk of the Court is ORDERED to make the following corrections to the docket:

in Civil Action No. 00-2838: terminate motion [19-1], which was ruled on by Order of April 24, 2001[64]; transfer motion [56-1], which was not filed in this case, to Civil Action No. 00-2937, in which it was filed; terminate motion [72-1], which was not filed in this case; terminate motion [74-1], which was not filed in this case .

in Civil Action No. 00-2937: terminate motion [17-1], which was ruled on by Order of April 24, 2001[53]; terminate motion [37-1] which was withdrawn by pleading [62]; terminate motion [62-1], which was not actually a motion, but a notice of the withdrawal of a motion.

SO ORDERED.

APPENDIX C

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-5223 September Term, 2001
00cv02838
00cv02885
00cv02937
00cv03085

Filed On: May 8, 2002

AMFAC RESORTS, L.L.C.,
Appellant

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.,
Appellees

Consolidated with 01-5226, 01-5229, 01-5233

BEFORE: Randolph and Garland, Circuit Judges; and Williams, Senior Circuit Judge

ORDER

Upon consideration of appellants' petition for rehearing filed April 15, 2002, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY:

Michael C. McGrail
Deputy Clerk

APPENDIX D

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-5223

September Term, 2001
00cv02838
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Filed On: May 8, 2002

AMFAC RESORTS, L.L.C.,
Appellant

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.,
Appellees

Consolidated with 01-5226, 01-5229, 01-5233

BEFORE: Ginsburg, Chief Judge; Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges; and Williams, Senior Circuit Judge

ORDER

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY:

Michael C. McGrail
Deputy Clerk

APPENDIX E

No. 94-496C
(Judge Bruggink)

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OLEN MAFFETT POUND d/b/a COLES POINT MARINA,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

DEFENDANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT UPON COUNT I OF THE COMPLAINT AND MOTION FOR SUMMARY JUDGMENT UPON COUNTS II AND III AND DEFENDANT'S COUNTERCLAIM

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Attorneys for Defendant

April 28, 1995

* * * * *

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS
94-496C

OLEN MAFFETT POUND d/b/a
COLES POINT MARINA,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

DEFENDANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT UPON COUNT I OF THE COMPLAINT AND MOTION FOR SUMMARY JUDGMENT UPON COUNTS II AND III AND DEFENDANT'S COUNTERCLAIM

Pursuant to Rules 12(b)(1) and 56 of the Rules of the United States Court of Federal Claims ("RCFC"), we respectfully request dismissal of Count I of the complaint for lack of subject matter jurisdiction, or in the alternative, summary judgment on Count I. Furthermore, defendant requests summary judgment on Counts II and III and on defendant's counterclaim. In support of this motion, we rely upon the pleadings, the following brief, with appendix[1] and the accompanying proposed findings of uncontroverted fact.

In this action, plaintiff, Olen Maffett Pound ("Pound"), was operating a concession at Cole's Point, Sardis Lake, Panola County, Mississippi, pursuant to Lease No. DACW38-1-81-169 (the "Lease") with the United States Army Corp of Engineers (the "Corps"). Defendant's motion to dismiss Count I of the complaint should be granted because this

[1] "App." refers to the appendix to this brief.

Court does not possess jurisdiction over Mr. Pound's breach of contract claim because Mr. Pound elected to pursue this claim before the Corps of Engineers Board of Contract Appeals ("ENGBCA"). Alternatively, defendant is entitled to summary judgment on Count I because there is no genuine issue of material fact that the Government properly revoked the Lease given that Mr. Pound violated paragraphs 3, 4, 9, 12, 13, 14, 15, and 18 of the Lease. Furthermore, defendant is entitled to summary judgment on Mr. Pound's claim contained in Count II for implied-in-fact contract to transfer his leasehold interest and Mr. Pound's claim for destruction of assets contained in Count III. Finally, defendant is entitled to summary judgment on its counterclaim for its approximately three-year effort to administer the revocation of the Lease and for its intensive cleanup and restoration of the premises formerly occupied by Mr. Pound.

QUESTIONS PRESENTED

1. Whether the Lease is governed by the Contract Disputes Act ("CDA"), 41 U.S.C. § 601 *et seq*.

2. Whether the Election Doctrine binds Mr. Pound to his decision to appeal his revocation of the Lease claim to the ENGBCA thereby requiring dismissal of Count I of the complaint.

3. Whether, in the alternative, defendant is entitled to summary judgment on Count I because there is no genuine issue of material fact that Mr. Pound breached numerous provisions of the Lease.

4. Whether defendant is entitled to summary judgment on Count II because there is no genuine issue of material fact that there was no mutual assent between the parties and, accordingly, no implied-in-fact contract between defendant and Mr. Pound to transfer his leasehold interest.

5. Whether defendant is entitled to summary judgment on Count III because there is no genuine issue of material

fact that the Lease expressly provides that Mr. Pound has no claim against the United States for destruction of assets.

6. Whether defendant is entitled to summary judgment on its counterclaim.

STATEMENT OF THE CASE

I. Nature Of The Case

In this case, Mr. Pound operated a concession at Cole's Point, Sardis Lake, Mississippi, that included cabins for rent, nontransient trailers, a restaurant, a campground, and a marina. After Mr. Pound's conviction for drug trafficking and his personal absence from the premises, defendant revoked Mr. Pound's Lease on January 26, 1990.

After the revocation, the Government devoted an extensive amount of time and effort over an approximately three-year period administering the revocation, cleaning up the premises, and restoring the premises. This complicated cleanup effort was necessitated primarily by a deterioration of tire and wooden breakwaters which Mr. Pound had constructed on the premises. As a result of the disintegration of the breakwaters, the Government removed several tons of debris from the waters of Sardis Lake and the surrounding area.

In Count I, Mr. Pound alleges that the Government improperly revoked his Lease. In Count II, Mr. Pound alleges that an implied-in-fact contract existed between the parties in order to transfer his leasehold interest. In Count III, Mr. Pound seeks recovery for the alleged destruction of some items of his personal property. The Government has also alleged a counterclaim for its expenses incurred related to the Lease and its cleanup and restoration efforts. As demonstrated below, however, defendant is entitled to summary judgment in its favor on all three counts of the complaint and on its counterclaims.

* * *

B. Mr. Pound's Revocation Of Lease Claim Is Subject To The Contract Disputes Act

In Count I of his complaint, Mr. Pound asserts that the Government is liable to him because the Government arbitrarily and capriciously revoked his Lease. Compl. ¶ 47.

Under the plain language of the Contract Disputes Act ("CDA" or "Act"), 41 U.S.C. §§ 601-613 (1988), the CDA applies to any express or implied contract for the procurement of property, other than real property in being, entered into after the effective date of the Act:

> Unless otherwise specifically provided herein, *the Act [the CDA] applies to any express or* implied *contract* . . . entered into by an executive agency for --
>
> (1) the procurement of property, other than real property in being; [and]
>
> (2) the procurement of services;
>
> (3) the procurement of construction, alteration, repair or maintenance of real property; or,
>
> (4) the disposal of personal property.

41 U.S.C. § 602(a) (emphasis added).

Mr. Pound's revocation of lease claim is subject to the CDA under either section 602(a)(3) or section 602(a)(4). As an initial matter, any claim pursuant to the lease falls under section 602(a)(4) because this lease is a contract for the disposal of personal property. The modern trend has been to treat leases as contracts rather than as conveyances of real property. *Passaic Distributors, Inc.* v. *Sherman Company,* 386 F. Supp. 647 (S.D.N.Y.); *Robert J. Di Domenico*, GSBCA No. 5539, 80-1 BCA ¶ 14,412 at 71,039.

* * *

Alternatively, in this case, the Lease falls within section 602(a)(3) because it concerns the "procurement of construction, alteration, repair or maintenance of real property." In this case, Mr. Pound was a concessioner who constructed several structures on the property at Cole's Point, including the breakwaters. Paragraph 4 of the Lease demonstrates that the Lease was for Government's procurement of construction by stating that the "lessee shall have the right . . . to erect such structures and to provide such equipment upon the premises as may be necessary." App. 140. Further, several paragraphs of the Lease demonstrate that the Lease was the Government procurement of maintenance services at Cole's Point. Paragraph 6 provides that Mr. Pound "will *maintain* all circulation roads within the trailer park." App. 140 (emphasis added). Paragraph 13 provides that Mr. Pound "shall keep the premises in good order and in a clean, sanitary, and safe condition and shall at all times *maintain* all structures and equipment." App. 141 (emphasis added).

* * *